No. 10235

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,

Appellant,

vs.

RICHARD E. SEWARD and HELEN ROBERTS, Liquidating Trustees of CON-ROD EXCHANGE, INC., a Corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO 60-10-7-42

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, for the Western District of Washington, Southern Division

No. 174

RICHARD S. SEWARD and HELEN ROBERTS, liquidating trustees of CON-ROD EXCHANGE INC., a corporation,

Plaintiff,

vs.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,

Defendant.

COMPLAINT

Comes Now the plaintiff and for its first cause of action against the defendant, alleges:

1.

That the Con-Rod Exchange, Inc., at all times hereinafter mentioned, was a corporation, organized, existing and doing business under and by virtue of the laws of the state of Washington; that it was legally dissolved under the laws of the State of Washington on January 8, 1940; that the plaintiffs, Richard S. Seward and Helen Roberts were the last directors and liquidating trustees of the said corporation, this cause of action thereby vesting in them. That corporation's principal place of business and plaintiffs' residence is within the judicial district of the above entitled court. That each trus-

tee and the said corporation is and was a citizen of the United States and that each has at all times borne true allegiance to the government of the United States, and that each has not in any way voluntarily aided, abetted or given encouragement to rebellion against said United States. That plaintiffs are justly entitled to the amount herein claimed from the United States, and that no assignment or transfer of said claim or any part thereof or any interest therein has been made.

2.

That the defendant at all times hereinafter mentioned [1*] was, and still is, the acting Collector of Internal Revenue of the United States for the Collection District of Washington, having an office and residing at Tacoma, Pierce County, within the above entitled district, and that the said defendant now is a citizen of the state of Washington, Pierce County therein.

3.

That for the period from June 21, 1932, to September 30, 1935 said corporation paid to the said defendant any and all manufacturer's excise taxes due to the defendant or to the United States of America under Section 606 (c) of the 1932 Revenue Act. That on or about April 27, 1936, the defendant, acting under the instructions of the Commissioner of Internal Revenue, notified the corporation that it was liable for a further assessment under

*Page numbering appearing at foot of page of original certified Transcript of Record.

the provisions of the said Section of the said Act in the sum of $2019.64. That thereafter, acting under the authority of the commissioner of Internal Revenue, the defendant required the corporation to and thereupon it did pay to the defendant the following amounts upon the respective dates:

Date of Payments	Amount
September 25, 1937	$ 50.00
October 25, 1937	50.00
November 26, 1937	50.00
December 27, 1937	50.00
January 25, 1938	50.00
February 25, 1938	50.00
March 25, 1938	50.00
May 5, 1938	50.00
May 25, 1938	50.00
June 24, 1938	50.00
July 25, 1938	50.00
August 25, 1938	50.00
September 25, 1938	50.00
October 25, 1938	50.00
November 26, 1938	50.00
December 29, 1938	50.00
January 25, 1939	50.00
February 25, 1939	50.00
April 5, 1939	50.00
April 25, 1939	50.00
May 23, 1939	50.00
June 23, 1939	50.00
July 28, 1939	50.00
	$1,150.00

This made a total payment of $1,150.00. That on or about the 17th day of February, 1940, plaintiffs duly filed with the defendant for transmission to the Commissioner of Internal Revenue a claim for refund and repayment of the said amount, a full,

true and correct copy of which claim is hereto attached, marked Exhibit "A", [2] and by this reference made a part hereof. That thereafter under date of April 18, 1940, the Commissioner of Internal Revenue in writing notified the plaintiffs that such claim was disallowed and rejected, a copy of which is hereto attached marked Exhibit "B" and by this reference made a part hereof.

4.

That the corporation was engaged in the business of repairing automobile parts in the city of Seattle, King County, Washington. That the transactions upon which the tax above referred to was assessed were not sales of goods manufactured or produced by the plaintiff within the intent and purpose of Section 606 of the Revenue Act of 1932, but were repairs made to automobile connecting rods, which connecting rods had at no time lost their identity as such, and were thereafter reinstalled in automobiles, and that the assessment of manufacturer's excise tax upon such connecting rods was wrongful, illegal and unwarranted, and plaintiffs are entitled to the return thereof with interest.

5.

That the charge made by the corporation for repaired automobile parts was not changed or altered in any respect because of the assessment of the tax, refund of which is now being asked, and that the corporation did not include the tax in the price or

charge of the repaired article with respect to which it was imposed by the defendant, nor was the amount of the said tax collected directly or indirectly from the customers or vendees.

6.

That on the 9th day of August, 1939, a trial was had before the above entitled court of an action by the corporation against this defendant, in which a refund of manufacturer's excise taxes was sought. That the said taxes which had been paid by the corporation were paid for the period from October 1, 1935 to August 31, 1936. That at the said trial all the allegations herein set forth in paragraphs 1 to 5, inclusive, above, excepting only the assessment of and the time of the payment of taxes, the refund of which is herein sought, the period of time for which they were [3] assessed by the defendant and the filing by the corporation of a claim for said refund in accordance with the Internal Revenue Code and the Regulations of the Commissioner of Internal Revenue were presented for determination to the said court, and were thereupon decided by the said court to be true as alleged by the corporation therein and as now set forth herein in paragraphs 1 to 5 inclusive. The said court made full and detailed findings of fact and conclusions upon the 30th day of August, 1939, which findings of fact and conclusions of law are attached hereto, marked Exhibit "C", and by this reference made a part hereof and incorporated herein as fully as though set forth herein. That upon the same date, namely, the 30th

day of August, 1939, said court ordered judgment for the corporation, a copy of which judgment is attached hereto, marked Exhibit "D" and by this reference is made a part hereof, and incorporated herein as fully as though set forth in full. The said judgment now is and stands unreversed and unmodified and in full force and effect, and the matters above set forth in paragraphs 1 to 5 inclusive, which were determined, adjudged and decreed in said decree were and are res adjudicata between the plaintiff and defendant in this cause.

As a Second Cause of Action, plaintiff further alleges:

1.

Plaintiff refers to paragraphs 1, 2, 4, 5 and 6 of its first cause of action, and by this reference incorporates the same herein as fully as though set forth in full.

2.

That for the period from June 21, 1932 to September 30, 1935, the corporation paid to the said defendant any and all manufacturer's excise taxes due to the defendant or to the United States of America under Section 606 (c) of the 1932 Revenue Act. That on or about the 27th day of April, 1936, the defendant, acting under the instructions of the Commissioner of Internal Revenue, notified the corporation that it was liable for a further assessment under the provision of the said section of said Act in the sum of $869.64 additional tax and $188.28 interest. That thereafter, acting under the authority

of the Commissioner of Internal Revenue, the defendant, [4] on the 23rd day of March, 1940, required the said corporation to and thereupon it did pay to the defendant the above set forth sum, a total payment of $1,057.92; on or about the 11th day of April, 1940, plaintiffs duly filed with the defendant for transmission to the Commissioner of Internal Revenue a claim for refund and repayment of said amount, a full, true and correct copy of which claim is attached hereto, marked Exhibit "E", and is by this reference made a part hereof and incorporated herein as fully as though set forth herein. That thereafter under date of July 31, 1940, the Commissioner of Internal Revenue, in writing, notified the corporation that such claim was disallowed and rejected, a copy of which letter is attached to the original complaint herein, marked Exhibit "F", and is by this reference made a part hereof and incorporated herein as though fully set forth herein.

Plaintiff further alleges as a Third Cause of Action:

1.

By reference to paragraphs 1, 2, 4 and 5 of the first cause of action, the said paragraphs are hereby incorporated herein as fully as though set forth in full.

2.

That, for the period from October 1, 1936 to September 30, 1938, said corporation paid to the said defendant any and all manufacturer's excise taxes due to the said defendant or to the United States

of America under Section 606 (c) of the 1932 Revenue Act. That subsequently, the defendant, acting under the instructions of the Commissioner of Internal Revenue, notified the corporation that it was liable for a further assessment under the provision of the said section of said Act in the sum of $78.96. That, thereafter, acting under the authority of the Commissioner of Internal Revenue, the defendant required the corporation to and it did pay to the defendant the above set forth sum as follows:

Date of Payments	Amount
November 16, 1936	$ 4.66
December 15, 1936	3.77
January 15, 1937	3.15
February 19, 1937	2.11
March 26, 1937	2.49
April 28, 1937	3.23
May 28, 1937	2.78
June 30, 1937	4.74
July 28, 1937	5.36
August 28, 1937	5.15
September 30, 1937	6.14
October 29, 1937	5.77
November 24, 1937	4.51
December 29, 1937	3.24
January 29, 1938	2.25
February 28, 1938	2.39
March 25, 1938	1.15
April 30, 1938	1.61
May 25, 1938	3.36
June 20, 1938	3.52
July 22, 1938	1.71
August 24, 1938	2.00
September 29, 1938	1.54
October 29, 1938	2.34
	$78.96

[5]

That on or about February 17, 1940, plaintiffs duly filed with the defendant for transmission to the Commissioner of Internal Revenue a claim for refund and repayment of said amount, a full, true and correct copy of which claim is attached hereto, marked Exhibit "G" and is by this reference made a part hereof and incorporated herein as fully as though set forth in full. That thereafter, under date of April 18, 1940, the Commissioner of Internal Revenue, in writing, notified the corporation that such claim was disallowed and rejected, a copy of which letter is attached hereto, marked Exhibit "B" and is by this reference made a part hereof and incorporated herein as fully as though set forth herein.

3.

As paragraph 3, plaintiffs refer to paragraph 6 of its first cause of action, and by this reference incorporate the same herein as fully as though set forth herein in full.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of $1,228.96, together with interest thereon after the 17th day of February, 1940, from and after the respective dates of payment as listed in the schedules attached to Exhibits "A" and "E" herein at the rate of 6% per annum until paid; plaintiffs further pray for judgment against the defendant in the sum [6] of $1,057.92, together with interest thereon from and after the 11th day of April, 1940, at the rate of

6% per annum until paid, together with its costs and disbursements herein.

GEORGE KINNEAR
Of Counsel for Plaintiff. [7]

EXHIBIT "A"

Form 843
Treasury Department
Internal Revenue Service
Revised June 1930

AMENDED CLAIM

CLAIM

To Be Filed with the Collector Where Assessment Was Made or Tax Paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp. (Date received)

State of Washington,
County of King—ss.

(Type or Print)

Name of taxpayer or purchaser of stamps—Con-Rod Exchange, Inc.

Business address—812 East Pike Street, Seattle, Washington.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Washington (at Tacoma)

2. Period (if for income tax, make separate form for each taxable year) from 6-21, 1932, to 9-30, 1935.

3. Character of assessment or tax—Manufacturers' Excise Tax

4. Amunt of assessment, $2,019.14; dates of payment—See Attached Sheet

5. Date stamps were purchased from the Government—

6. Amount to be refunded—$1,150.00.

7. Amount to be abated (not applicable to income or estate taxes)—

8. The time within which this claim may be legally filed expires, under Section 3312 (a) of the Revenue Act of 19..., on Sept. 25, 1941, and subsequent thereto:

The deponent verily believes that this claim should be allowed for the following reasons:

This claim of refund is based upon the opinion of Yankwich, D.J., in the case of Con-Rod Exchange, Inc. (this taxpayer) v. Henricksen, a copy of which is attached hereto. The sales upon which

the manufacturers' tax was assessed in the period above set forth were sales of rebabbitted conrods and were of exactly the same nature as the sales upon which taxes were assessed for the period from Oct. 1, 1935, to August 31, 1936, which were considered by Yankwich, D.J., in the opinion just mentioned.

Judgment was rendered for the plaintiff in the above-entitled case, claimant herein, on the 30th day of August, 1939. The case was tried in the Western District, Southern Division, of Washington.

Claimant further states with particular reference to the statement above that "the sales * * * were of exactly the same nature as the sales upon which taxes were assessed for the period from Oct. 1, 1935, to August 31, 1936, which were considered by Yankwich, D.J." (not as an addition thereto but for the purpose of being more specific) that "the burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees either as a separate item or as a portion of the sales price" (quoted from Findings of Fact of above cited case). The property of the original statement is supported by Pink vs. United States, 105 F (d) 183.

As to the contention that claimant's business was one subject to a manufacturers' excise tax, it is claimant's position that the judgment rendered for claimant, as above set forth is res adjudicata.

New Orleans v. Citizens Bank, 167 U. S. 371, 42 L. Ed 202;

Pink v. U. S. 38-1 U.S.T.C. 9402; (Appealed on other issues) 105 F (d) 183;
Tait v. Western Maryland Ry. 289 U. S. 620; 77 L. Ed. 1405.

Claimant requests further consideration of its claim

(Signed) CON-ROD EXCHANGE, INC.

.....

President

Sworn to and subscribed before me this 17 day of February 1940.

.....

Notary Public.

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: Character of assessment and period covered, List, Year, Month.

Account No. or Page, Line, Amount assessed $..... Total, $.....

Paid, Abated, or Credited, Date, Amount, $..... Total, $.....

Claim No.....

I certify that the records of this office show the following facts as to the purchase of stamps: To Whom Sold or Issued, Kind, Number, Denomination, Date of sale or issue, Amount $.....

If special tax stamp, state: Serial number, Period commencing—

.....

Collector of Internal Revenue

.....

(District)

Claim examined by.....

Claim approved by.....

Chief of Division. .....

Amount claimed.. $.....

Amount allowed.. $.....

Amount rejected.. $.....

Committee on Claims

.....

.....

.....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Date of Payments	Amount
September 25, 1937	$50.00
October 25, 1937	50.00
November 26, 1937	50.00
December 27, 1937	50.00
January 25, 1938	50.00
February 25, 1938	50.00
March 25, 1938	50.00
May 5, 1938	50.00
May 25, 1938	50.00
June 24, 1938	50.00
July 25, 1938	50.00
August 25, 1938	50.00
September 25, 1938	50.00
October 25, 1938	50.00

Date of Payments	Amount
November 26, 1938	50.00
December 29, 1938	50.00
January 25, 1939	50.00
February 25, 1939	50.00
April 5, 1939	50.00
April 25, 1939	50.00
May 23, 1939	50.00
June 23, 1939	50.00
July 28, 1939	50.00
	$1,150.00

EXHIBIT "B"

TREASURY DEPARTMENT
Washington

Office of Commissioner
of Internal Revenue
MT:ST:JNG

Apr. 18, 1940

Con-Rod Exchange, Inc.,
812 East Pike Street,
Seattle, Washington.

Gentlemen:

Reference is made to your claims for the refund of $1,150.00 and $78.97, representing tax, penalty and interest paid under the provisions of section 606 (c) of the Revenue Act of 1932, for the periods June 21, 1932 to September 30, 1935, and October 1, 1936 to September 30, 1938, respectively.

The claims are based on the contention that tax

was erroneously paid on sales of rebabbitted connecting rods. In this connection you have cited the decision rendered August 17, 1939 in your favor by the United States District Court for the Western District of Washington, Southern Division. This decision covers manufacturer's excise tax paid for the period October 1, 1935 to August 1, 1936, inclusive.

This office takes the position that a person who produces connecting rods, etc. from used or scrap material or from both new and used material by a manufacturing process which produces serviceable articles is subject to the manufacturer's excise tax imposed by section 606 (c) of the Revenue Act of 1932 on his sales thereof. A case on this point which supports the Bureau's position and declines to follow the decision referred to above is Clawson and Bals, Inc., Plaintiff-Appellant, v. Collector of Internal Revenue, Defendant-Appellee, decided in the United States Circuit Court of Appeals for the Seventh Circuit on December 13, 1939. The United States Supreme Court denied certiorari in this case April 8, 1940.

These claims cover the identical periods and payments of tax as claims S-78721 and 78723, which were rejected February 1, 1940, therefore, they are duplicate claims.

In view of the foregoing, the claims are rejected in full.

Your attention is invited to the fact that regardless of the foregoing, no allowance could be made

with respect to your claims in view of section 621 (d) of the Revenue Act of 1932, which prohibits the Commissioner from allowing a refund of overpayments of tax under Title IV of the Revenue Act of 1932 unless the person claiming the refund establishes that he has neither passed the tax on to his customers as a separate item nor included it in the selling price of his product, or, if he has passed the tax on to his customers as a separate item or included it in his selling price, that he has either refunded the amount of the tax to the ultimate purchaser or has received the written consent of each ultimate purchaser to the allowance of the refund.

Respectfully,

GUY T. HELVERING,

Commissioner.

By (D. S. Bliss)

D. S. BLISS

Deputy Commissioner.

cc-Tacoma, Wash.

EXHIBIT "C"

In the District Court of the United States for the Western District of Washington, Northern Division

No. 8570

CON-ROD EXCHANGE, INC., a corporation,
Plaintiff,

vs.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 9th day of August, 1939 before the above-entitled court, Honorable Leon R. Yankwich presiding therein, sitting without a jury.

Plaintiff appeared by its attorneys, Jones & Bronson, and was represented in Court by Mr. H. B. Jones and Mr. George Kinnear, and the defendant appeared by its attorneys, Mr. J. Charles Dennis and Mr. Oliver Malm, United States Attorneys, and was represented in Court by Mr. Thomas S. Winter, Deputy United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, makes its

FINDINGS OF FACT:

Finds that all of the allegations of plaintiff's complaint are true.

Finds that all of the allegations contained in the second defense of defendant's answer are untrue.

And more particularly, the Court finds:

I.

That the plaintiff, Con-Rod Exchange, Inc., at all times hereinafter mentioned, was and now is, a corporation, organized, existing and doing business under and by virtue of the laws of the State of Washington, and that it has paid all fees due the [8] State of Washington, including the license fee last past due. That its principal place of business is within the judicial district of the above-entitled Court. That it is a citizen of the United States; and that it has at all times borne true allegiance to the Government of the United States, and that it has not in any way voluntarily aided, abetted or given encouragement to rebellion against said United States.

II.

That the defendant at all times hereinafter mentioned and since the 11th day of July, 1936, was and still is the Acting Collector of Internal Revenue of the United States for the Collection District of Washington, having an office and residing at Tacoma, Pierce County, within the above-entitled district, and that said defendant now is a

citizen of the State of Washington, Pierce County therein.

III.

That on or about April 27, 1937 the defendant, acting under the instruction of the Commissioner of Internal Revenue, determined that the plaintiff was liable for a further assessment of taxes under the provisions of Section 606 (c) of the Revenue Act of 1932, said assessment being for excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit: connecting rods and armatures and starting rods. The additional assessment was in the sum of $234.84 and $11.74 penalty. Thereafter, acting under the authority of the Commissioner of Internal Revenue, the defendant, on the 26th day of August, 1937, required the plaintiff to, and thereupon it did, pay to the defendant the above stated sums, together with interest thereon of $8.22, or a total payment of $254.80.

This assessment of excise taxes collected from the plaintiff, as set forth in the preceding paragraph, was with respect to sales of automobile connecting rods and armatures, as stated heretofore, sold by plaintiff during the period from October 1, 1935 to August 31, 1936. $11.52 of the assessment represented [9] additional assessment of excise tax and penalty upon the sale of armatures and starting rods and $235.06 represented an additional assessment of excise tax and penalty upon the sale of connecting rods.

IV.

That on or about August 27, 1937 plaintiff duly filed with the defendant, for transmission to the Commissioner of Internal Revenue, its claim for refund of the aforesaid excise taxes and interest and penalty assessed against and collected from the plaintiff, as hereinbefore set forth, in the aggregate amount of $254.80. This claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for and the ground supporting the refund for said taxes.

V.

Thereafter, under the date of November 10, 1937, the Honorable Guy T. Helvering, Commissioner of Internal Revenue, acting by and through the Honorable D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, basing this rejection upon the merits of the claim, notified the plaintiff of such rejection and disallowance by letter dated November 10, 1937, signed by said Deputy Commissioner.

VI.

The plaintiff did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiff did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles

in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

VII.

The largest part of the aforesaid excise taxes were [10] assessed and imposed in respect of sales by plaintiff of rebabbitted connecting rods. For the most part all of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff had been used as operating parts of automobile motors, and by reason of such use the babbitt metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired. These rods were acquired by plaintiff from various wrecking houses throughout the country or from individuals bringing in used rods from their own automobiles for the purpose of having the said babbitt bearings replaced.

In some few instances where new car models were placed upon the market with entirely different types or sizes of connecting rods the plaintiff would purchase a limited supply of new connecting rods from automobile manufacturers or dealers. In these cases it was merely acting as an ordinary jobber when making sales to its customers.

VIII.

Plaintiff imported none of said connecting rods in respect of which said excise taxes were assessed,

but obtained all thereof from sources within the United States. At no time has plaintiff imported, nor does it now import, any automobile parts or accessories whatsoever.

IX.

The rebabbitting consisted in applying a metal alloy to the inside and edges of the bearing formed by the detachable cap and the large end of the shank of the rod. The method of doing the work was, in substance, this: Plaintiff purchased shanks from wrecking houses, either in Seattle or elsewhere, to establish a stock in a particular type of connecting rod. After a stock was once established, individual customers would bring in used shanks for rebabbitting. If the plaintiff had in stock a rebabbitted connecting rod of the same size and type as the customer's, it was given in exchange to the particular customer. In the case [11] of new automobile models, with new types of connecting rods, the plaintiff would purchase some new connecting rods from the automobile manufacturers. To rebabbitt the rod a used forging or shank, after the cap and the shank had been separated, was placed in a container of hot babbitt, which would melt off and dissolve the old babbitt still adhering to the old forging. The forging was then placed in an acid solution which cleaned off all grease and dirt. Then the new alloy was applied to the bearing by pouring, after which the surface of the new babbitt was evened so that the cap and the shank would fit

together again. The inside of the new babbitted bearing was rough-bored to a size slightly smaller than what was to become the finished diameter, then a broaching occurred, which, finally, resulted in providing the prescribed diameters. The connecting rods were then placed in plaintiff's stock.

The used connecting rod consisted primarily of a forging formed by a shank and cap fastened together by bolts, which formed an opening constituting the bearing intended to contain a babbitted surface. The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bluk compared with the total size and bulk of the connecting rods, the babbitted surface being but approximately one-sixteenth of an inch or less in thickness.

A rebabbitted connecting rod is a secondhand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the taxes involved in this case were imposed, were secondhand connecting rods when sold by plaintiff after the same were rebabbitted. The price for which they were sold was less than that charged for new connecting rods.

X.

The connecting rods which were rebabbitted by plaintiff, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods [12] during, or as a result of, the rebabbitting process in plaintiff's shop.

There is no change in shape or identity of the rod following the rebabbitting. The dimensions remain the same. The only new part is a thin layer of metal alloy applied to the bearing, smoothed out and the edges evened, so that the bearing will have the holding quality which had been lost in the old one through the wearing off of the old babbitt. The function of the shank is still the same. The result achieved is less of a structural change than takes place when old armatures are rewound.

None of the identifying symbols, trade-marks, number or other identifying data appearing on said connecting rods were moved, marred or obliterated during, or as a result of, the rebabbitting process in plaintiff's shop, but on the contrary, all such identifying numbers and data were left intact.

XI.

Plaintiff's books and records show that seventy-five per cent. (75%) or more of its sales of rebabbitted connecting rods were sales of rods brought in by customers wherein the same rods were rebabbitted and returned. The defendant does not argue that these are other than repair jobs.

A certain amount of the sales made, shown by the plaintiff's books to be not more than twenty-five per cent. (25%) of the total sales, were of an exchange nature. Where possible plaintiff maintained a stock of rebabbitted rods upon its shelves of various kinds and makes. This was a matter of convenience to the plaintiff and its customers so

that the latter, by exchanging their old, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods. That not more than 25% of the additional tax applied to exchange sales. [13]

XII.

The rebabbitting process performed by plaintiff upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and secondhand connecting rods, and did not constitute the manufacture or production of connecting rods.

XIII.

During the period of time involved in this case —namely, October 1, 1935 to August 31, 1936, the plaintiff engaged in no rewinding or processing or repairing of armatures or processing or repairing of starting rods whatsoever and has not carried on any such business subsequent to 1934.

XIV.

The plaintiff at no time manufactured, produced or imported any automobile parts or accessories whatsoever. The sales of rebabbitted connecting rods with respect of which the largest part of the excise taxes involved in this case was imposed, did not constitute the sales of automobile parts or ac-

cessories by a manufacturer, producer or importer in any instance.

Dated this 30th day of August, 1939.

LEON R. YANKWICH,
United States District Judge

Presented by:

GEORGE KINNEAR
Of Attorneys for Plaintiff

From the foregoing Findings of Fact, the Court makes and enters the following

CONCLUSIONS OF LAW:

I.

The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and main- [14] tenance of this suit.

II.

That plaintiff is not, and was not during the times involved in this suit, the manufacturer, producer or importer of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

III.

The excise tax imposed by Section 606(c) of the Revenue Act of 1932 does not apply to sales of re-

babbitted automobile connecting rods by one who acquires such rods secondhand and rebabbitts the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

IV.

In holding and determining that the tax imposed by Section 606(c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods, rewound armatures and repaired starting rods by plaintiff during the period from October 1, 1935 to August 31, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

V.

Under the evidence and the law the plaintiff is entitled to judgment against defendant in the sum of Two Hundred Fifty-four and 80/100 ($254.80) Dollars, together with interest thereon from August 26, 1937 at the rate of six per cent. (6%) per annum, and together with plaintiff's costs and disbursements, as provided by law.

Dated this 30th day of August, 1939.

LEON R. YANKWICH
United States District Judge.

Presented by:

GEORGE KINNEAR
Of Attorneys for Plaintiff. [15]

EXHIBIT "D"

In the District Court of the United States for the Western District of Washington, Northern Division

No. 8570

CON-ROD EXCHANGE, INC., a corporation,
Plaintiff,

vs.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 9th day of August, 1939 before the above-entitled Court, Honorable Leon R. Yankwich presiding therein, sitting without a jury.

Plaintiff appeared by its attorneys, Jones & Bronson, and was represented in Court by Mr. H. B. Jones and Mr. George Kinnear, and the defendant appeared by its attorneys, Mr. J. Charles Dennis and Mr. Oliver Malm, United States Attorneys, and was represented in Court by Mr. Thomas S. Winter, Representative of the Chief Counsel, Bureau of Internal Revenue.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, and having made and entered its Findings of Fact and Conclusions of Law herein,

Now, Therefore, it is Ordered, Adjudged and Decreed that plaintiff have and recover judgment against the defendant in the sum of Two Hundred Fifty-four and 80/100 ($254.80) Dollars, together with interest thereon from August 26, 1937 at the rate of 6% per annum, and together with plaintiff's costs and disbursements to be taxed, as provided by law.

Dated this 30th day of August, 1939.

LEON R. YANKWICH
United States District Judge.

Presented by:
GEORGE KINNEAR
Of Attorneys for Plaintiff. [16]

I, Leon R. Yankwich, District Judge of the United States, and sitting in the District Court of the United States for the Western District of Washington, on this 30th day of August, 1939, do hereby certify:

That the acts done by the defendant in the above entitled case, as the Collector of Internal Revenue, in imposing and assessing and exacting and collecting the said excise tax, in the amount of $254.80, comprising $234.84 tax, plus $11.74 penalty and $8.22 interest, as set forth in the foregoing judgment, were done in his official capacity as such Collector of Internal Revenue, and the said Thor W. Henricksen had probable cause for his acts, notwithstanding the fact that a part of said tax was

erroneously collected, and judgment has been rendered for a refund thereof in this case.

Dated this 30th day of August, 1939.

LEON R. YANKWICH,
United States District Judge. [17]

EXHIBIT "E"

Form 843
Treasury Department
Internal Revenue Service
Revised June 1930

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp (Date received)

State of Washington,
County of King—ss.

(Type or Print)

Name of taxpayer or purchaser of stamps—Con-Rod Exchange, Inc.

Business address—812 East Pike Street, Seattle, Washington

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Washington (at Tacoma)

2. Period (if for income tax, make separate form for each taxable year) from 6-21, 1932, to 9-30, 1935

3. Character of assessment or tax—Manufacturers' Excise Tax

4. Amount of assessment, $1057.92 ($869.64 assessed—$188.28 int. thereon. Paid 3/23/40

5. Date stamps were purchased from the Government—

6. Amount to be refunded—$1057.92

7. Amount to be abated (not applicable to income or estate taxes)—

8. The time within which this claim may be legally filed expires, under Section 3313 IRC, on March 21, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

The tax assessed and paid, the refund of which is hereby being asked, was manufacturers' excise tax for the period of 6-21-32 to 9-30-35. It was assessed upon sales of rebabbitted Con-Rods. These Con-Rods were exactly the same character as those

sold by this taxpayer during the period from October 1, 1935 to August 1, 1936. The nature of the entire transactions of sale were also the same. The assessment of tax upon this type of sale as made by this taxpayer for the earlier period was considered by Yankwich, D. J., in the Western District, Southern Division of Washington. The said court held these sales not to be subject to the manufacturers excise tax and rendered judgment for the plaintiff on the 30th day of August, 1939, in accordance with a written opinion, a copy of which was previously filed with the Collector of Internal Revenue on or about February 16, 1940. This claim is based upon the said opinion and judgment.

Claimant further states with particular reference to the statement above that "the nature of the entire transactions of sale were also the same" as those passed on by the District Court (not as an addition thereto but for the purpose of being more specific) that "the burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees either as a separate item or as a portion of the sales price" (quoted from Findings of Fact of above cited case). The prop*iety* of the original statement is supported by Pink v. United States, 105 F (2) 183.

Claimant basis its position further on the ground that the judgment rendered for it as above set forth is res adjudicata as to the issues involved therein,

these being the same as those relating to the present claim of refund.

New Orleans v. Citizens Bank, 167 U. S. 371, 42 L. Ed. 202;

Pink v. U. S. 38-1 U.S.T.C. 9402; (Appealed on other issues) 105 F (2d) 183;

Tait v. Western Maryland Rwy. 289 U. S. 620; 77 L. Ed. 1405. [18]

(Signed) CON-ROD EXCHANGE, INC.
By *RUTRARD* SEWARD
President

Sworn to and subscribed before me this 10 day of April, 1940.

E. A. NIEMEIER
Notary Public

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: Character of assessment and period covered, List, Year, Month. Account No. or Page, Line. Amount assessed $..... Total, $.....

Paid, Abated, or Credited, Date, Amount, $..... Total, $.....

Claim No.....

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued, Kind, Number, Denomination, Date or sale or issue, Amount $.....

If special tax stamp, state: Serial number, Period commencing—

.....

Collector of Internal Revenue.

.....

(District)

Claim examined by—.....

Claim approved by—.....

Chief of Division.

Amount claimed.. $.....

Amount allowed.. $.....

Amount rejected.. $.....

Committee on Claims

.....

.....

.....

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

EXHIBIT "F"

TREASURY DEPARTMENT
Washington

Office of Commissioner
of Internal Revenue
MT:ST:JNG
Cl. S-84499

Jul 31 1940

Con-Rod Exchange, Inc.,
812 East Pike Street,
Seattle, Washington.

Gentlemen:

Reference is made to your claim for the refund of $1,057.92, representing tax, penalty and interest paid under the provisions of section 606(c) of the Revenue Act of 1932, for the period June 21, 1932 to September 30, 1935, inclusive.

The claim is based on the contention that tax was erroneously paid on sales of rebabbited connecting rods. In this connection you have cited the decision rendered in your favor on August 17, 1939 by the United States District Court for the Western District of Washington, Southern Division. This decision covers manufacturer's excise tax paid for the period October 1, 1935 to August 1, 1936, inclusive.

This office takes the position that a person who produces connecting rods, etc. from used or scrap material or from both new and used material by a manufacturing process which produces serviceable

articles is subject to the manufacturer's excise tax imposed by section 606(c) of the Revenue Act of 1932 on his sales thereof. A case on this point which supports the Bureau's position and declines to follow the decision referred to above is Clawson and Bals, Inc., Plaintiff-Appellant, v. Collector of Internal Revenue, Defendant-Appellee, decided in the United States Circuit Court of Appeals for the Seventh Circuit on December 13, 1939. The United States Supreme Court denied certiorari in this case April 8, 1940.

In view of the foregoing the claim is rejected in full.

Your attention is invited to the fact that regardless of the foregoing, no allowance could be made with respect to your claim, in view of the section 3443(d) of the Internal Revenue Code, which prohibits the Commissioner from allowing a refund of overpayments of tax under Title IV of the Revenue Act of 1932, unless the person claiming the refund establishes that he has neither passed the tax on to his customers as a separate item nor included it in the selling price of his product, or, if he has passed the tax on to his customers as a separate [19] item or included it in his selling price, that he has either refunded the amount of the tax to the ultimate purchasers or has received the written consent of each ultimate purchaser to the allowance of the refund.

Respectfully,

GUY T. HELVERING,

Commissioner.

By:
(D. S. Bliss)
D. S. BLISS,
Deputy Commissioner.

cc-Tacoma, Washington. [20]

EXHIBIT "G"

Form 843
Treasury Department
Internal Revenue Service
Revised June 1930

AMENDED CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Refund of Tax Illegally Collected.
Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
Abatement of Tax Assessed (not applicable to estate or income taxes).
Collector's Stamp (Date received)

State of Washington,
County of King—ss.

Type or Print

Name of taxpayer or purchaser of stamps—Con-Rod Exchange, Inc.

Business address—812 East Pike Street, Seattle, Washington.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Washington (at Tacoma)

2. Period (if for income tax, make separate form for each taxable year) from 10-1-36 to 9-30-38.

3. Character of assessment or tax—Manufacturers' Excise Tax

4. Amount of assessment, $78.96; dates of payment—See Attached Sheet

5. Date stamps were purchased from the Government—

6. Amount to be refunded—$78.96

7. Amount to be abated (not applicable to income or estate taxes)—

8. The time within which this claim may be legally filed expires, under Section 3312 (a) IRC on October 1, 1940 and subsequent thereto:

The deponent verily beliefes that this claim should be allowed for the following reasons:

The tax assessed and paid, the refund of which is hereby being asked, was manufacturers excise tax paid monthly during the period set forth above. It was assessed upon sales of rebabbitted Con-Rods. These Con-Rods were exactly the same character as those sold by this taxpayer during the period

from October 1, 1935 to August 1, 1936. The nature of the entire transactions of sale were also the same. The assessment of tax upon this type of sale as made by this taxpayer for the earlier period was considered by Yankwich, D. J., in the Western District, Southern Division of Washington. The said court held these sales not to be subject to the manufacturers excise tax and rendered judgment for the plaintiff on the 30th day of August 1939 in accordance with a written opinion, a copy of which is attached to a separate claim of refund filed this day by this taxpayer. This claim is based upon the said opinion and judgment.

Claimant further states with particular reference to the statement above that "the nature of the entire transactions of sale were also the same" as those passed on by the District Court (not as an addition thereto but for the purpose of being more specific) that "the burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees either as a separate item or as a portion of the sales price" (quoted from Findings of Fact of above cited case). The prop*iety* of the original statement is supported by Pink v. United States 105 F (2) 183.

As to the contention that claimant's business was one subject to a manufacturer's excise tax, it is claimant's position that the judgment rendered for claimant, as above set forth, is res adjudicata.

New Orleans v. Citizens Bank, 167 U.S. 371, 42 L. Ed. 202;

Pink v. U. S. 38-1 U.S.T.C. 9402; (Appealed on other issues) 105 F (2) 183;

Tait v. Western Maryland Rw. 289 U. S. 620; 77 L. Ed. 1405.

Claimant requests further consideration of its claim. [21]

(Signed) CON-ROD EXCHANGE, INC.

.....

President

Sworn to and subscribed before me this ..... day of February, 1940.

.....

Notary Public.

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: Character of assessment and period covered, List, Year, Month.

Account No. or Page, Line, Amount assessed $..... Total, $.....

Paid, Abated, or Credited, Date, Amount, $..... Total, $.....

Claim No.....

I certify that the records of this office show the following facts as to the purchase of stamps: To Whom Sold or Issued, Kind, Number, Denomination, Date of sale or issue, Amount $.....

If special tax stamp, state: Serial number, Period commencing—

.....

Collector of Internal Revenue

.....

(District)

Claim examined by.....

Claim approved by.....

Chief of Division. .....

Amount claimed.. $.....

Amount allowed.. $.....

Amount rejected.. $.....

Committee on Claims

.....

.....

.....

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy

collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name followed by the signature and title of the officer having authority to sign for the corporation.

November 16, 1936	$ 4.66
December 15, 1936	3.77
January 15, 1937	3.15
February 19, 1937	2.11
March 26, 1937	2.49
April 28, 1937	3.23
May 28, 1937	2.78
June 30, 1937	4.74
July 28, 1937	5.36
August 28, 1937	5.15
September 30, 1937	6.14
October 29, 1937	5.77
November 24, 1937	4.51
December 29, 1937	3.24

January 29, 1938	2.25
February 28, 1938	2.39
March 25, 1938	1.15
April 30, 1938	1.61
May 25, 1938	3.36
June 20, 1938	3.52
July 22, 1938	1.71
August 24, 1938	2.00
September 29, 1938	1.54
October 29, 1938	2.34
	$78.96

[Endorsed]: Filed Sept. 28, 1940. [22]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant by J. Charles Dennis, and Frank Hale, United States Attorney and Assistant United States Attorney, respectively, for the Western District of Washington and in answer to plaintiff's alleged first cause of action, admits, denies and alleges as follows:

I.

Answering Paragraph I defendant admits the allegations therein contained except defendant denies that the plaintiff was fully entitled to the amount herein claimed from the United States and that no assignment or transfer of said claim or any part thereof or any interest therein has been made.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Answering Paragraph III, defendant admits that the Con-Rod Exchange, Inc. paid the total sum of $1,150.00 to the defendant as Acting Collector of Internal Revenue as taxes assessed against said corporation under the provisions of Section 606 (c) of the Revenue Act of 1932 in the amounts [23] therein alleged except defendant alleges there are slight discrepancies as to the dates of payment thereof and demands strick proof thereof; defendant also admits that the claim for refund was filed on February 21, 1930, and not on February 17, 1940, as alleged and that said claim for refund was disallowed and rejected under date of April 18, 1940, but defendant denies each and every other allegation in said paragraph.

IV.

Answering Paragraph IV, defendant denies each and every allegation therein contained and further answering said paragraph alleges that the Con-Rod Exchange, Inc., at all times therein mentioned was a corporation engaged in the manufacture and/or producer of articles sold by it within the provisions of Section 606 (c) of the Revenue Act of 1932 and Regulations promulgated thereunder and upon which the assessments were levied and the tax paid.

V.

Defendant denies the allegations contained in Paragraph V.

VI.

Answering Paragraph VI, defendant admits that on August 9, 1939, a trial was had before the above-entitled court of an action by the Con-Rod Exchange, Inc. against this defendant in which a refund of manufacturer's excise taxes was sought; that the said taxes which had been paid by the corporation were paid for the period from October 1, 1935, to August 31, 1936; that the said court made and entered Findings of Fact and Conclusions of Law upon the 30th day of August, 1939, which are attached to plaintiff's complaint; that upon the same date, namely the 30th day of August, 1939, the said court ordered judgment for the [24] corporation, a copy of which judgment is also attached to plaintiff's complaint but defendant denies each and every other allegation in said paragraph.

Further answering said paragraph, defendant alleges that the said judgment is not unreversed and unmodified and in full force and effect and that the matters set forth in Paragraph I to V, inclusive, which were determined, adjudged and decreed and said decree is not res judicata. Defendant further alleges that the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of United States v. Armature Exchange, 116 Fed. (2d) 969 is conclusive and binding as regards the instant case.

Defendant, in answer to plaintiff's alleged second cause of action admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant refers to Paragraphs I, II, IV, V and VI of his answer to plaintiff's alleged first cause of action and by this reference incorporates the same herein as if set out hoc verba.

II.

Answering Paragraph II, defendant admits that the Con-Rod Exchange, Inc. paid the sum of $1,057.92 as alleged to the defendant as Acting Collector of Internal Revenue covering taxes assessed against the said corporation under the provisions of Section 606 (c) of the Revenue Act of 1932 and Regulations promulgated thereunder; that the claim for refund was filed on April 11, 1940, and that the said claim for refund was disallowed and rejected under date of July 31, 1940, but defendant denies each and every other allegation in said paragraph. [25]

Defendant, in answer to plaintiff's alleged third cause of action, admits, denies and alleges as follows:

I.

Defendant refers to Paragraphs I, II, IV and V of his answer to plaintiff's alleged first cause of action and by this reference incorporates the same herein as if set out hoc verba.

II.

Answering Paragraph II, defendant admits that the Con-Rod Exchange, Inc. paid the total sum of $78.96 to the defendant as Acting Collector of Internal Revenue covering taxes assessed against the

said corporation under the provisions of Section 606 (c) of the Revenue Act of 1932 and Regulations promulgated thereunder in the amounts therein alleged except defendant alleges that there are slight discrepancies as to the dates of payment thereof and demand strict proof; defendant also admits that the claim for refund was filed on February 21, 1940, and not on February 17, 1940, as alleged, and that the said claim for refund was disallowed and rejected under date of April 18, 1940, but defendant denies each and every other allegation in said paragraph.

III.

Answering Paragraph III, defendant refers to Paragraph VI of his answer to plaintiff's alleged first cause of action and by this reference incorporates the same herein as if set out hoc verba.

Wherefore, defendant, having fully answered the plaintiff's alleged first, second and third causes of action, prays that those actions be dismissed with costs to the [26] defendant.

J. CHAS. DENNIS
United States Attorney
FRANK HALE
Ass't United States Attorney
THOMAS R. WINTER
General Counsel Representative

Copy received Apr. 11, 1941.
JONES & BRONSON
Attorneys for Pltf.

[Endorsed]: Filed Apr. 12, 1941. [27]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 13th day of January, 1942, before the above-entitled Court, Honorable Lewis B. Schwellenbach presiding therein, sitting without a jury.

Plaintiffs appeared by their attorneys, Jones & Bronson, and were represented in Court by Mr. H. B. Jones and Mr. R. B. Hooper, and the defendant appeared by his attorneys, Mr. J. Charles Dennis and Frank Hale, United States Attorneys, and was represented in Court by Mr. Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Witnesses were sworn and testimony given at the said hearing and the Court being fully advised in the facts and the law makes its

FINDINGS OF FACT

I.

That the Con-Rod Exchange, Inc., the corporation on behalf of which this suit was brought, at all times hereinafter mentioned prior to January 8, 1940, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. That it was legally dissolved under the laws of the State of Washington on January 8, 1940; that the plaintiffs, Richard S. Steward and Helen Roberts, were the last directors and the liquidating trustees of the said corporation, and this

cause of action [28] thereby vested in them. That the corporation's principal place of business and plaintiffs' residence is within the judicial district of the above-entitled Court. That each trustee and the said corporation is and was a citizen of the United States and that each has at all times sworn true allegiance to the Government of the United States, and that each has not in any way voluntarily aided, abetted nor given encouragement to rebellion against said United States. That no assignment or transfer of the claim herein or any part thereof or any interest therein has been made.

II.

That the defendant at all times hereinafter mentioned was the acting Collector of Internal Revenue of the United States for the collection district of Washington, having an office and residing at Tacoma, Pierce County, within the above-entitled district, and that the said defendant now is a citizen of the State of Washington, Pierce County, therein.

III.

That on or about April 27, 1936, the defendant, acting under the instruction of the Commissioner of Internal Revenue, determined that the Con-Rod Exchange, Inc. was liable for an assessment of manufacturer's excise taxes in the principal sum of $2,019.64 and for interest in the sum of $188.28 under the provisions of Section 606 (c) of the Revenue Act of 1932, said assessment being for excise

taxes for the period from June 21, 1932, to September 30, 1935, upon the manufacture and sale by the corporation of certain automobile parts, to-wit, connecting rods. The defendant further determined that for the period from October 1, 1936 to September 30, 1938, this corporation was liable for an assessment under the above provision of the Revenue Act of 1932 in the sum of $78.96. Thereafter, acting under the [29] authority of the Commissioner of Internal Revenue, the defendant required the corporation to, and thereupon it did, at the times hereinafter mentioned, pay to the defendant the amounts of $2,207.92 and $78.96. On or about February 17, 1940 and April 11, 1940, the corporation duly filed with the defendant for transmission to the Commissioner of Internal Revenue, claims for refund and repayment of said amounts.

IV.

That the taxes hereinabove referred to were paid at the times and in the amounts as follows:

Date of Payments	Amount
September 27, 1937	$50.00
October 27, 1937	50.00
November 29, 1937	50.00
December 28, 1937	50.00
January 26, 1938	50.00
February 28, 1938	50.00
March 28, 1938	50.00
May 6, 1938	50.00
May 26, 1938	50.00
June 25, 1938	50.00
July 26, 1938	50.00

Date of Payments	Amount
August 27, 1938	50.00
September 28, 1938	50.00
October 26, 1938	50.00
November 28, 1938	50.00
December 30, 1938	50.00
January 26, 1939	50.00
February 28, 1939	50.00
April 6, 1939	50.00
April 26, 1939	50.00
May 26, 1939	50.00
June 27, 1939	50.00
July 31, 1939	50.00
March 22, 1940	636.85
March 22, 1940	421.07
Total	$2,207.92
November 16, 1936	4.66
December 15, 1936	3.77
January 15, 1937	3.15
February 19, 1937	2.11
March 26, 1937	2.49
April 28, 1937	3.23
May 28, 1937	2.78
June 30, 1937	4.74
July 28, 1937	5.36
August 28, 1937	5.15
September 30, 1937	6.14
October 29, 1937	5.77

[30]

November 24, 1937	4.51
December 29, 1937	3.24
January 29, 1938	2.25
February 28, 1938	2.39
March 25, 1938	1.15
April 30, 1938	1.61
May 25, 1938	3.36
June 20, 1938	3.52
July 22, 1938	1.71

Date of Payments	Amount
August 24, 1938	2.00
September 29, 1938	1.54
October 29, 1938	2.34
	$ 78.97

V.

These claims for refund were made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and were so filed within four years after the date of payment of said taxes, and said claims set forth the reasons for and the grounds supporting the refunds of said tax payments. Thereafter, under dates of April 18, 1940, and July 31, 1940, the Commissioner of Internal Revenue, in writing, notified the plaintiffs that these claims were disallowed and rejected.

VI.

On the 9th day of August, 1939, the trial of an action by Con-Rod Exchange Inc., the corporation involved herein, against this defendant, was held in the above-entitled court before the Honorable Judge Leon R. Yankwich, Cause No. 8570, in which a refund of manufacturer's excise taxes assessed and collected under Section 606 (c) of the Revenue Act of 1932 was sought. These taxes had been paid by the corporation for the period from October 1, 1935 to August 31, 1936. The said Court, upon the 30th day of August, 1939, made full and detailed findings of fact and conclusions of law, and thereupon entered judgment in favor of the plaintiff corporation.

VII.

The type of material used in the operations of this corporation, the physical process of rebabbitting the con- [31] necting rods, and the basis upon which the business was conducted, were identical in their nature during the periods involved in this action and in the preceding suit, except that it was stipulated that all of the taxes herein involved were levied upon transactions in which customers of the corporation exchanged old connecting rods on which the babbitts had been worn, for newly rebabbitted ones or "exchange sales" similar to those which constituted the largest part of the corporation's business during the period involved in the prior suit. All other material facts involved in the present action were also involved in the preceding action heard by this Court, excepting only the amount of the assessment of and the time of the payment of the taxes, the refund of which is herein sought; the period of time for which they were assessed by the defendant; and the time of the filing by the corporation of the claim for said refund in accordance with the Internal Revenue Code and the Regulations of the Commissioner of Internal Revenue.

VIII.

The Court in the cause above referred to found that the largest part of the assessment of said excise taxes was made with respect to sales by this corporation of rebabbitted connecting rods; that the rebabbitting process performed by the plaintiff

therein upon the connecting rods, and in respect to which the excise taxes therein involved were imposed, whether on an "exchange basis" or on a basis wherein customers received back their own repaired rods, constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods; that the sale of rebabbitted connecting rods did not constitute sales of automobile parts or accessories by a manufacturer, producer or importer in any instance; that the plaintiff corporation did not include the said excise taxes in the price of the articles with [32] respect to which said taxes were imposed and it did not collect the amount of said taxes or any part thereof from the vendee or vendees of the articles in respect to which said taxes were imposed.

IX.

The Court in the aforementioned cause concluded that the plaintiff corporation was not, during the times involved in that suit, the manufacturer, producer or importer of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932; that the excise tax imposed by Section 606 (c) of the Revenue Act of 1932 did not apply to sales of rebabbitted automobile connecting rods by one who acquired such rods second-hand and rebabbitted the same and who neither manufactur*er*, produced nor imported any other automobile parts or accessories. The Court thereupon entered judgment for the plaintiff in the principal

amount of the taxes assessed for the period therein concerned. Said judgment now is and stands unreversed and unmodified and in full force and effect.

X.

The corporation, upon behalf of which this action is brought, did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and it did not collect the amount of said taxes or any part thereof from the vendee or vendees of the articles in respect to which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiff and the burden of none of said taxes was passed on by the said corporation to its customers or vendees.

Dated this 4 day of March, 1942.

LEWIS B. SCHWELLENBACH
United States District Judge

Presented by:

R. B. HOOPER
Of Attorneys for Plaintiff. [33]

From the foregoing Findings of Fact, the Court makes and enters the following

CONCLUSIONS OF LAW

I.

The individual plaintiffs herein and the corporation on behalf of which they have brought this action and each of them have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

II.

That the decision of this Court in the case of Con-Rod Exchange, Inc. v. Henricksen, Cause No. 8570, 28 Fed. Supp. 924, decided August 17, 1939, is res judicata in this cause with respect to the issue of whether or not the taxes imposed herein by Section 606 (c) of the Revenue Act of 1932 and for which this suit for refund was brought, were properly assessed and collected.

III.

That by reason of the unmodified and final decision of this Court in the Cause hereinabove referred to, the Con-Rod Exchange Inc. was not during the time involved in this suit, the manufacturer, producer or importer of automobile connecting rods within the meaning of Section 606 of the Revenue Act of 1932.

IV.

In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to the sales of rebabbitted connecting rods sold by the plaintiff during the period from June 21, 1932 to September 30, 1935, and from October 1, 1936 to September 30, 1938, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932. [34]

V.

Under the evidence and the law, the plaintiffs are entitled to judgment against the defendant in the

sum of $2,286.89, together with interest thereon from the respective dates of payment as set forth in the Findings of Fact herein, at the rate of six per cent (6%) per annum and together with plaintiffs' costs and disbursements as provided by law.

Dated this 4th day of March, 1942.

LEWIS B. SCHWELLENBACH
United States District Judge.

Presented by:
R. B. HOOPER
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Mar. 4, 1942. [35]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 174—Tacoma

RICHARD E. SEWARD and HELEN ROBERTS, liquidating trustees of CON-ROD EXCHANGE, INC., a corporation,

Plaintiffs,

v.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 13th day of January, 1942, before the

above-entitled Court, Honorable Lewis D. Schwellenbach presiding therein, sitting without a jury.

Plaintiffs appeared by their attorneys, Jones & Bronson, and were represented in Court by Mr. H. B. Jones and Mr. R. B. Hooper, and the defendant appeared by his attorney, Mr. J. Charles Dennis and Frank Hale, United States Attorneys, and was represented in Court by Mr. Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Witnesses were sworn and testimony given at the said hearing and the Court being fully advised in the facts and the law, and having made and entered its Findings of Fact and Conclusions of Law herein,

Now, Therefore, it is Ordered, Adjudged and Decreed that plaintiffs have and recover judgment against the defendant in the sum of $2,286.89, together with interest thereon as provided by law and for costs and disbursements to be taxed as provided by law.

Dated this 4th day of March, 1942.

L. B. SCHWELLENBACH
United States District Judge

Presented by:
R. B. HOOPER
Of Attorneys for Plaintiffs [36]

I, Lewis B. Schwellenbach, District Judge of the United States, and sitting in the District Court of the United States for the Western District of Wash-

ington, on this 21st day of February, 1942, do hereby certify:

That the acts done by the defendant in the above entitled case, as the Collector of Internal Revenue, in imposing and assessing and exacting and collecting the said excise tax, in the amount of $2,286.89, as set forth in the foregoing judgment, were done in his official capacity as such Collector of Internal Revenue, and the said Thor W. Henricksen had probable cause for his acts, notwithstanding the fact that all of said tax was erroneously collected, and judgment has been rendered for a refund thereof in this case.

Dated this 4th day of March, 1942.

LEWIS B. SCHWELLENBACH
United States District Judge

Judgment corrected and amended pursuant to Stip. and Order filed May 8, 1942.

E. REDMAYNE,
Dep. Clerk

[Endorsed]: Filed Mar. 4, 1942. [37]

[Title of District Court and Cause.]

STIPULATION AND ORDER CORRECTING JUDGMENT

It is hereby stipulated and agreed by and between the plaintiffs, by their attorneys, Jones &

Bronson, and defendant, by his attorneys, J. Charles Dennis, United States Attorney for the District of Washington and Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, that judgment in the above case dated the 4th day of March, 1942, be corrected by striking from said judgment in the last paragraph thereof, after the word "thereon" the following words:

> "from the respective dates of payment as shown by the Findings of Fact herein in the amount of $380.14, making a total judgment of $2,667.03, together with plaintiffs' costs and disbursements to be taxed as provided by law, said judgment to bear interest at six per cent (6%) from this date until paid"

and inserting in lieu thereof the words—

> "as provided by law and for costs and [38] disbursements to be taxed as provided by law".

Dated this 29th day of April, 1942.

JONES & BRONSON
R. B. HOOPER
Attorneys for Plaintiffs
J. CHAS. DENNIS
THOMAS R. WINTER
Attorneys for Defendant

Upon the above stipulation of the parties by their attorneys and good cause appearing therefor, it is hereby

Ordered that the judgment be so amended.

Dated this 30 day of April, 1942.

L. B. SCHWELLENBACH
Judge.

Presented by:
THOMAS R. WINTER

[Endorsed]: Filed May 8, 1942. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thor W. Henricksen, Acting Collector of Internal Revenue, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment dated the 21st day of February, 1942, and filed in the above-entitled Court on the 4th day of March, 1942, which judgment was corrected by an order dated the 29th day of April, 1942, and filed May 8, 1942.

Dated this 1st day of June, 1942.

J. CHARLES DENNIS
United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed June 1, 1942. [40]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

It is hereby stipulated by and between the defendant appellant, by his attorneys, J. Charles Dennis, United States Attorney for the District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and plaintiffs appellees, by their attorneys, Jones & Bronson, that the time for filing the record on appeal and the docketing of the action shall be extended to a date ninety days from the date of first notice of appeal, which date was June 1, 1942, and that an order may be entered granting such extension.

J. CHARLES DENNIS
United States Attorney.
THOMAS R. WINTER
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
Attorneys for Defendant Appellant
JONES & BRONSON
Attorneys for Plaintiffs Appellees

Approved and So Ordered This 6th day of July, 1942.

LLOYD L. BLACK
United States District Judge

[Endorsed]: Filed July 7, 1942. [41]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant, Thor W. Henricksen, will rely upon the following points in the prosecution of his appeal from the judgment of the United States District Court for the Western District of Washington, Southern Division:

I.

That the United States District Court erred in entering Judgment for the appellees and against appellant for $2,667.03 and interest; conversely, the Court erred in failing and refusing to enter Judgment for appellant dismissing appellees' suit with costs.

II.

The United States District Court's findings do not support the Judgment or the Court's conclusions of law.

III.

The United States District Court erred in making and entering Findings VI, VII, VIII, IX and X because the contents thereof were incompetent, immaterial and irrelevant in determining the issue of whether or not the appellees are entitled to the refund claimed by it. [42]

IV.

The United States District Court erred in holding (Conclusion of Law II) that its previous decision

of August 17, 1939, was res judicata with respect to the issue of whether or not the taxes involved in this suit were properly assessed and collected.

V.

The United States District Court erred in holding (Conclusion of Law III) that by reason of the previous decision for a different taxable period appellee "was not the manufacturer, producer or importer of automobile connecting rods" during the period involved in this suit.

VI.

The United States District Court erred in holding (Conclusion of Law IV) that the Commissioner exceeded the authority granted him under the Revenue Act of 1932 in determining that the taxes in question applied to the connecting rods sold by appellees during the period in dispute in the present suit.

VII.

The United States District Court erred in holding (Conclusion of Law V) that under the law and the evidence appellees are entitled to judgment against appellant.

VIII.

The United States District Court erred in determining that the sales of the connecting rods by appellees during the taxable period involved herein were not sales of automobile parts by a manufac-

turer or producer thereof within the purview of Section 606 (c) of the Revenue Act of [43] 1932.

J. CHARLES DENNIS
United States Attorney
HARRY SAGER
Assistant United States Attorney
THOMAS R. WINTER
Special Assistant to the Chief Counsel for the Bureau of Internal Revenue.

Copy Rec'd. Aug. 19, 1942.
JONES & BRONSON
Attorneys for Plaintiffs

[Endorsed]: Filed Aug. 20, 1942. [44]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Defendant, Thor W. Henricksen, Acting Collector of Internal Revenue for the District of Washington, hereby designates the entire record in this case to be contained in the record on appeal, more particularly described as follows:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.

4. Judgment.
5. Stipulation and Order Correcting Judgment.
6. Notice of Appeal.
7. Order Extending Time to File and Docket Record on Appeal.
8. Transcript of Testimony.
9. All Exhibits.
10. Statement of Points.
11. This Designation.

J. CHARLES DENNIS
United States Attorney
HARRY SAGER
Assistant United States Attorney
THOMAS R. WINTER
Special Ass't to Chief Counsel, Bur. of Int. Revenue

Received copy this 19th day of Aug., 1942.
JONES & BRONSON
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 20, 1942. [45]

In the United States District Court, for the Western District of Washington, Southern Division

Record of Proceedings:

At a regular session of the United States District Court for the Western District of Washing-

ton, held at Tacoma, in the Southern Division thereof, on the 25th day of August, 1942, the Honorable Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, to-wit:

No. 174

[Title of Cause.]

MINUTE ORDER

On this 25th day of August, 1942, on motion of Thomas R. Winter, attorney for defendant, for an order to transmit to the Circuit Court of Appeals, with the Transcript of the Record on Appeal herein, the original exhibits offered or admitted in evidence in the trial of this cause,

It Is Ordered that the Clerk of this Court be and he is hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit, with the Transcript of the Record on Appeal herein, the original exhibits in this Cause, to-wit: Plaintiffs' Exhibits Nos. 1 and 2. [46]

[Title of District Court and Cause.]

STATEMENT OF FACTS

Be It Remembered, the above-entitled action came on regularly for hearing, on this the 13th day of January 1942, before the Honorable Lewis B.

Schwellenbach, Judge, sitting in Tacoma, Washington;

The plaintiffs herein were represented by their Counsel, Jones & Bronson, Attorneys-at-Law, of Seattle, Washington;

The defendant was represented by his attorneys, Harry Sager, Esq., Assistant United States Attorney, Tacoma, Washington; and Thomas R. Winter, Esq., Special Attorney, Department of Internal Revenue, of Seattle, Washington.

Whereupon, the following proceedings were had:

[49]

Mr. Jones: Your Honor, perhaps we might take up the Con-Rod case and see what course it is going to take.

The Court: All right.

Mr. Jones: I call it the "Con-Rod Case." The file gives the title. It presents the question of the liability for manufacturer's excise tax under the Act of 1932.

Now, as the case develops, it will be shown that this relates to the manufacture or repair of Con-rods.

The Court: I have read the briefs.

Mr. Jones: Well, there are three periods involved here. The first period which is concerned in this suit, is from the time the account became effective in July of 1932, to the first of October, of 1935. Then there was a period of one year, from October 1935, to October, 1936, that was separately assessed and collected and then there was the pe-

riod from October of 1936 to October of 1938, which was where the payments were made pursuant to the audit that had been made, and requirement, and that is a separate period.

Mr. Winter: Mr. Jones, with respect to that latter period, that was based entirely on the returns filed by the taxpayers— no issue as to the percentage, that is all strictly exchange business, Your Honor.

Mr. Jones: That is right, Your Honor.

The Court: What do you mean by that, "strictly exchange"?

Mr. Winter: That is strictly where a customer [50] would exchange old rods and get an entirely different set; he wouldn't get his own rods back. In other words, they would call it "Con-Rod Exchange", which the name implies. * * If someone took four rods to the garage, they would take the old rods back and rebabbitt them and put them back in stock.

Mr. Jones (Continuing): These three periods were subject to separate assessment and it just happened that this second period for the one year was paid all at once; the Collector gave some time on the payments of some others and so, it seemed most expedient to bring the suit on that.

As a matter of fact, it was contemplated, at that time, that a suit would determine the whole period, not a matter of binding the defendant but only a historical explanation. So, we brought that suit and tried it before Judge Yankwich.

Now, the processes that were involved, as Counsel says, were rebabbi*t*ing of connecting rods. Those processes fell, generally, into two categories, I might say. A customer having some wornout connecting rods, would go in the plaintiff's shop and say, "I want to have these rods repaired" and he would hand him over the particular rods, he would rebabb*it* those rods and turn them back to the customer.

That is strictly a repair job under any of the decisions and under the rulings and enforcement of the Collector's office, and isn't considered manufacture.

I think there is no controversy on that point, but, in addition to repairing—— [51]

Mr. Winter (Interrupting): In that connection, we will concede there is no controversy on that point and the assessment doesn't contemplate any tax on those transactions, where a man would insist on having his own rods repaired and returned to him.

The Court: That is the first period?

Mr. Winter: Yes, your Honor. We contend that the Deputies, from the records of the taxpayers, to the best of their ability, and legally, accepted their records and assessed the tax or recommended assessment of the tax entirely upon that basis and none other.

There is a further period in there that the record will show that there were no records for a very early period, for 1932 and 1933, and the assessment was based upon a percentage basis; that is, accept-

ing the same basis as 1934 and 1935, using the same basis, because there was no other basis to go on, and we, as a Commissioner, didn't err in taking that position.

Mr. Jones (Continuing): As I say, these operations fall into two classifications: where you take rods in to have them repaired, like shoes they make the repair and return those specific rods or exchanges back * * *. (Completes opening Statement for the plaintiff herein.)

The doctrine of res judicata is well established and, under the authorities, I think is plainly applicable to this case.

That is our prime position here. Should Your Honor feel the doctrine of res judicata is not applicable, then it becomes necessary to determine how [52] much of this assessment is based on purely exchange transactions and how much on repair transactions. We are in this position, that the Agents came to us and made this audit, I think they were there for some five or six months; it involved going over, I suppose, thousands of transactions, very small in themselves, $2.00 or $3.00 or $4.00 and figuring the tax on that. We got no bill of particulars with our tax; we simply got a demand for payment of so much manufacturer's tax, so we don't know except as we infer or surmise, what items the defendant took into account in assessing and collecting this tax.

I have suggested to Counsel for the Government—I asked whether we could get a statement from them

of what the tax covered and he said no that that was the levy and they didn't propose to furnish any statements.

It is true, I never asked for a bill of particulars on it but I made this suggestion then, that if the Court would dispose of the issue of law—if you hold that this is res judicata, we don't need to go into these thousands of transactions. The manufacturer is here; he says he has about a ton of records down in his car to bring up here, if we have to do it. * * * If we went through all these items, it would take a tremendous length of time and I don't think we ought to have to do that. If Your Honor decides the res judicata is applicable** we don't have to. If not, and it is necessary for the parties to make this segregation, I feel sure if the Government will have their man, their investigating agent sit down with our auditor, they can determine those matters and I don't think we need [53] to take the time of the Court to pass on those small items.

That, I think, presents the matter, as we see it, for submission.

Mr. Winter: (Makes opening statement for the defendant herein.)

The Court: Are you agreed you have three periods: the first period, you have no records, you assume you have the same percentage in the first period as you have in the case before Judge Yankwich, is that correct?

Mr. Winter: No, there are two periods involved, from 1932 to 1935 and from 1936, October 1936 to 1938.

The Court: He tried October 1935 to 1936?

Mr. Winter: Yes.

The Court: The first period prior to that time, as I understand, you don't have the records?

Mr. Winter: Yes, we have records for 1932 and 1933; we don't have records for 1932 and 1933, but we examined the records for 1934 and 1935 and took the actual exchanges from their records and arrived at that tax, month by month, and assumed 1932 and 1933 were the same amounts with respect to tax as there was in 1934 and 1935, according to their volume of business.

The Court: Then 1936 to 1938——?

Mr. Winter (Interrupting): 1936 to 1938, that is all exchanges, because they were on returns and actual records kept by the taxpayer and filed by the taxpayer and they paid the tax with the return.

The Court: You agree, as far as 1936 and 1938 are concerned, they are all exchanges? [54]

Mr. Jones: Yes, we agree all were exchanges for that period, that is right.

Mr. Winter: (Continues opening statement.)

The Court: What is the disagreement? Last two years for the first period?

Mr. Jones: Of the last two years of the first period? Of course, I can't state——

Mr. Winter (Interrupting): The plaintiff hasn't alleged what amount.

Mr. Jones: We can't because we don't know the basis of the assessment, but the disagreement would be (1) that it is res judicata under the other de-

cision and then from the practical standpoint, we don't know what the disagreement is because we don't know the details of what enters into the assessment. That is what we have to go into through investigation of the records, when we find out the basis of the assessment.

Mr. Winter: Here is the Deputy Collector's report. (Handing document to Mr. Jones.)

Mr. Jones: I can't very well go into details now; I tried to get this information quite awhile ago and I couldn't get it.

The Court: The point I have in mind? suppose I should decide that plaintiff's theory about res judicata is correct, you still have to make a record here as to the amount there is in dispute, about the last two years, they all are exchanges?

Mr. Jones: Yes, I thought about that feature of it. Suppose Your Honor decided res judicata was applicable and we still don't have the record to find [55] anything to the contrary, if the Appellate Court should disagree——

Mr. Winter (Interrupting): They would have to send it back for a new trial.

Mr. Jones: I think that could be reserved—if you decide res judicata is applicable, we can submit it on the understanding Your Honor is not deciding what the result would be, if it is not applicable, that if the case is reversed, that would be a matter to be taken up and agreed upon?

The Court: Is that satisfactory, Mr. Winter?

Mr. Winter: I see no necessity, unless Counsel would stipulate that, unless Counsel wants to go

into the—of course, that is the Court's prerogative; I don't know whether it will be satisfactory to the Department. I can't speak for the Department, but all the Circuit Court would do if it should reverse your Honor would be to just send it back for new trial and then the evidence could be taken at that time.

The Court: Yes, but I don't want any opinion of the Circuit Court saying I should have done it in the first place, and you are the only representative of the Department here and you are in Court.

Mr. Winter: Well, of course, we maintain, if the Court please, that all of those are exchanges and we have the records, we have taken from the records to prove it and the burden is upon the taxpayer to prove otherwise.

Mr. Jones: I concede Counsel is correct, the burden is upon us, if we are going to go into these facts, the burden is upon us to go into them, but I was [56] hoping——

Mr. Winter (Interrupting): There is no allegation in the complaint what part of—you haven't alleged, they were not exchanges.

The Court: What I am trying to do is to work out a situation where we can avoid taking a lot of testimony. If I am going to decide the case on res judicata, there is no sense of sitting up here a couple of days listening to testimony as to whether certain connecting rods were exchanges or repairs; yet, I don't want to just decide it upon—what I want to do, if Counsel is willing to have an agreement—that

for the purpose of this hearing, I can assume they are all exchanges and decide it upon that basis and then if I decide for the Government upon the question of res judicata, then I will have to hear the testimony as to which were exchanges and which repairs.

Mr. Winter: Of course, we are not contending any of the sales, which are set up, are sales.

The Court: I am asking if it is satisfactory to you, that I can go ahead now and decide it upon the question of res judicata and assume they are all exchanges? That is what I asked you?

Mr. Winter: May I confer with Mr. Dennis on that matter, Your Honor?

The Court: Yes.

Mr. Winter: As a matter of fact, I am merely assistant to the United States Attorney on these cases.

(Short recess.)

Mr. Winter: I have conferred with Mr. Dennis [57] and both he and I, since the United States is the defendant in this case, asking for a money judgment, in the event Your Honor decides the question is res judicata, adverse to the United States, the amount involved would justify an appeal; whereas, if Your Honor found that, as a matter of fact, the taxpayer, in any event, didn't owe more than a few dollars, it would then raise the question as to whether or not an appeal would be justified because of the amount involved.

I think that is about the only point. If we were

not the defendant in this case, of course, I think it is to the plaintiff's advantage and to the disadvantage of the defendant in this case—so, we would prefer that the plaintiff prove his case on all issues. If Your Honor decides that way, adverse to the United States, on the issue of res judicata—of course, we take the position that this decision, that the effect of the decision, as conceded by Counsel, was to overrule the proposition of law, as to whether or not this process is a manufacture or not—we say it is analogous to those cases.

(Further argument.)

The Court: You have the same process each year, do you?

Mr. Winter: We have the same process but different percentage—whether or not that was in the mind of the Court, I have no way of knowing, except it does not appear to have been——

The Court (Interrupting): If that had been in the mind of Judge Yankwich, he would have held 25 percent was collectible. [58]

Mr. Winter: No, he had already held in the Armature case that that process—there were armatures involved in the first case, Your Honor; in the case of the Con-Rod Exchange case, there were armatures involved in that case.

Mr. Jones: Very insignificantly.

Mr. Winter: Very few instances, but there were a few armatures involved in that case; there are no armatures involved in this case.

Mr. Jones: No armatures involved here.

The Court: Rewinding of armatures is much more a manufacturing process than rebabbi*t*ing connecting rods.

Did you ever rewind an armature?

Mr. Winter: Yes, Your Honor, I worked in an armature rewinding company, I know the process, but I have never had occasion to work on a rebabbi*t*ing job but there are a number of parts about an automobile, probably 50 percent of the automobile parts, which are interchangeable, which are renewed. * * *

The Court: I think under this other case, this Clawson & Bals case, that, clearly, I have got to hold that the rebabbi*t*ing of connecting rods is a manufacturing process. Frankly, when I read the rearmature case, I thought there was a lot of difference between that and rebabbi*t*ing connecting rods, but when I read the second case——

Mr. Jones (Interrupting):

There are two decisions just rendered by the Circuit Court of Appeals, 9th Circuit which apply—Armature exchange case, rebabbi*t*ing connecting rods—where they are exchanges. [59]

Mr. Winter: (Further argument.)

The Court: Let's forget about the problems and get in and argue this question of res judicata, first.

Mr. Winter: That is what I am saying.

(Further argument.)

Now, we don't concede that the facts are the same, we concede that the process is the same, but we concede that the facts are different in the percentages and amount of business which they did, that they

were more like Clawson & Bals in the first period, in that practically all of their business was exchange business; that is, they came closer in that period to a manufacturing than they did in the later period, because they started out with a large stock in the early period and were practically exclusively in the exchange business except those few types, extra types which would come in to be rebabbited. So, we think that the facts are different, the plaintiff is different.

The Court: Aren't those facts against you, though?

Mr. Winter: The Courts have held, you don't apply the rule of res judicata where the United States and the Collector——

Mr. Jones (Interrupting): What is that, Mr. Winter? Don't apply it where the distinction is between the United States and the Collector——?

Mr. Winter (Interrupting): Yes.

Mr. Jones: We have no difference in the plaintiffs here—to apply the rule of res judicata here, where the decision has been overruled by this Court and the decision in the armature case binding upon this Court, [60] because the Ninth Circuit case—not the Con-Rod Exchange case, no, Your Honor, but the principle, the process as to whether or not it was taxable or not taxable, was overruled by the Circuit Court of Appeals, Ninth Circuit.

The Court: I don't think any estoppel lies, after the armature case was decided in any case, because the element of estoppel runs through the basis of the res judicata rule.

Mr. Winter: Of course, that is our position, to apply the rule of res judicata here, particularly by the same parties and same subject—if they manufactured today (the fact is, they are out of business), nevertheless they could still revive the corporation and be the same corporation.

The Court: Do you have any other cases, aside from this armature case? I have a feeling the Blair case is a case where the decision in the State Court was a decision, so far as the federal Court is concerned, a question of fact, they considered the State rule as a question of fact and decided the Federal Court case and that it made a different state of facts—that that is the distinction between the Mallard and this case.

Mr. Winter: We say the rule in the Armature case made a different state of facts.

The Court: That is a rule of law?

Mr. Winter: Well, it held that the process was a manufacturing process as distinguished from a repair matter. Of course, that is our only position, we concede that without the armature case, it certainly would be res judicata in this case but since the decision upon which the Court relies in arriving at his decision was erroneous—— [61]

Mr. Jones (Interrupting): Counsel makes that concession, I think he concedes the argument because that is the doctrine of stare decisis, the application of the rule to other similar cases, but res judicata is not concerned with that; we are concerned with the decision, admittedly, erroneous. I

admit the decision was erroneous but it stands as a final adjudication between these parties, under res judicata, no matter how erroneous the decision is, it is the law of the parties.

(Further argument.)

The Court: Any change in fact to which you refer is against the Government.

Mr. Winter: No, any change in the facts, in the later years is against the Government; all the facts are more favorable to the Government in the earlier years because there they were clearly a Clawson & Bals business.

The Court: It seems to me I have to construe Judge Yankwich's decision on the basis that he felt that whether or not they were exchanges, or whether they were manufacturers—using the term "manufacturer" in the light of the armature decision, not in the light that he considered it——

Mr. Winter: Your Honor is also going to find the facts the same in evidence here, but we don't admit the facts are the same.

Mr. Jones: Well, I will put the evidence on.

The Court: I will make a ruling in favor of the plaintiff on the question of res judicata; I think that this Blair case doesn't answer the Tate case, because the State decision was considered in the Blair case, not as a [62] decision in the Federal Court on the question of law, but as a question of fact to be considered by the Federal Court; the State Court having laid down a rule, that was a fact considered by the Federal Court and it made a dif-

ferent set of facts. In fact, the Blair case was the first case dediced and I don't feel, since that is the case, upon which you rely, that the Government has answered the case of Tate v. Western Maryland Railway Company.

I will rule for the plaintiff on the question of res judicata.

As Mr. Jones suggested, you people can get together and have your respective accountants agree upon the facts about this case and save a coule of days' time for the Court and lawyers and everybody else. If you want to try that, why, I will continue the case over until the next time I come back.

Mr. Winter: I don't know how we can go any further than we have gone.

Mr. Jones: I think I can make a suggestion on this.

Mr. Winter (Indicating): As a matter of fact, Your Honor, Your Honor can see the sheets I have before me, are the actual invoice number of all the items which were taken from the actual records—of course, our copies. Now, the plaintiff has the burden—the burden is upon the plaintiff to show just what were exchanges and what the amount of their exchanges were.

The Court: You have your man here who did this work?

Mr. Winter: Your Honor, he is working—not [63] in the Government service. I have no control over him. I will just have to get someone in the Government service to work on it.

The Court: He is here today?

Mr. Winter: Yes.

Mr. Jones: We have our accountant here.

The Court: Why not go ahead with the other case during the rest of the morning and let the two of them go in there and see if they can figure the thing out.

Mr. Jones: Mr. Winter, I am satisfied if you give us a record of the stuff you have, we can tell how much we dispute and in what category it falls, whether an exchange or new sale.

Mr. Winter: Mr. Trace, head of the Miscellaneous Tax, is here. I will ask him to see what they can work out. Mr. Trace, you understand what the Court has in mind?

Mr. Jones: I think I should make a record by testimony in support of the res judicata issue; unless, I didn't catch just what Your Honor said, whether you said upon admissions of Counsels you would hold it applied?

The Court: No, I am not satisfied, with the testimony, as a matter of law——

Mr. Jones (Interrupting): In other words, you hold res judicata is applicable if the facts sustain it and I think I should submit at this time the testimony on the res judicata issue. Is that agreeable?

The Court: If there is a possibility of the two gentlemen getting together, wouldn't it be better to do that this afternoon, in a couple of hours they will have it worked out—then we can take the testimony? [64]

Mr. Jones: I think the testimony is distinct—I thought if I could submit that testimony, just as to the res judicata feature,—I will have to have Mr. Trace to do that.

The Court: All right.

RUSSELL TRACE,

called as a witness on behalf of the plaintiffs herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name, please?

A. Russell Trace.

Q. What is your business, Mr. Trace?

A. Chief of the Miscellaneous Tax Division, Bureau of Internal Revenue.

The Court: What are your initials?

A. R. Russell.

Q. How long have you held that position, Mr. Trace? A. Nearly 25 years.

Q. Does the matter of collection of manufacturer's excise taxes under the Act of 1932 come under your jurisdiction, insofar as they are in this territory? A. Yes.

Q. And are you familiar with the tax that was assessed against the Con-Rod Exchange, the predecessor of the plaintiffs in this action?

A. Yes.

Q. What do your records show, Mr. Trace, as

(Testimony of Russell Trace.)

to the different [65] assessments that were made against this plaintiff, have you got a record there?

A. In what respect do you mean?

Q. Well, the periods covered and amounts. You have that record there?

A. I haven't the assessment here; all I have are the claims for abatements and rejections.

Q. May I ask you this: Do you recall that there were two assessments, at any rate separate assessments, one for the period, beginning of the account, July 1932 up to the end of September 1935?

A. Yes.

Q. The other October 1st, 1935, to the end of September 1936? A. Yes.

Q. What was the reason for there being two assessments instead of all being one?

A. Well, I am unable to answer that question, definitely.

Q. Well, so far as you know, was there any reason?

A. The reason was, as far as I can remember, was to get the first in before the statute of limitation would run against it but I am not so sure that that is true, I can't answer your question.

Q. So far as you recall, was it due to any difference in the character of the business or application of the tax? A. No, sir.

Q. Is it your understanding that this tax—for the period from July 1, 1932, to the end of September of 1935. involved in this action, was entirely a

(Testimony of Russell Trace.)

tax due on operations concerning connecting rod repairs or manufacture? [66]

A. So far as the records show, it was.

Q. Did you examine any of these invoices and records, yourself? A. No, sir.

Q. Do you know whether there were any records that were examined for the period of 1932 and 1933? Did the plaintiff have any records for that period?

Mr. Winter: We object to that. It doesn't appear this witness examined them. How would he know?

Mr. Jones: I am asking if he knows?

A. No, sir, I have no knowledge. All I have is the deputies' reports. I have no knowledge.

Q. Who were the agents who made your examination?

A. Well, there were different ones.

Mr. Winter: (Handing document to the witness)

A. (Indicating) Here is one here, original reports of these signed by Phillip Evans and L. C. Hazard and Byrd.

Mr. Winter: Who is that?

A. I think it is "Berg".

Mr. Winter: The second name you gave?

A. L. C.—Antegard.

Mr. Winter: I might say, Your Honor, Mr. Antegard was subpoenaed, but as he is deceased, of course, we didn't know where to serve him.

Q. Are any of those agents in your employ now?

(Testimony of Russell Trace.)

A. I think Mr. Evans is.

Mr. Winter: In your employ?

A. Isn't he in now? I am not acquainted with these men in the field. The last I knew, he was. I have only just been in the office here.

Q. Is one of the agents who made the examination in the courtroom now? [67]

A. Well, I don't know.

Q. Mr. Winter, do you have one of the agents here?

Mr. Winter: Yes, Mr. Evans is here.

Mr. Jones: All right, that is all of this witness.

(Witness excused)

PHILLIP EVANS,

called as a witness on behalf of the plaintiffs herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name, please?

A. Phillip Evans.

Q. Mr. Evans, were you connected with the Excise Division of the Collector of Internal Revenue's office for a period? A. Yes.

Q. Did you have anything to do with auditing the accounts of the Con-Rod Exchange for manufacturer's tax purposes? A. Yes.

Q. Just tell us what you had to do and what period you covered?

(Testimony of Phillip Evans.)

A. Well, of course, several years ago, but my recollection is it was covering the period from 1932 on and we were instructed as to how to interpret the application of the tax and we went up there, went through the different invoices and applied them according to what we considered a correct interpretation. [68]

Q. Do you have any records that you made in connection with your investigation?

A. With me, personally?

Mr. Winter: The Report? A. Yes.

Q. What have you in your hand there?

A. Here are the returns we made, which are practically summaries we made, picked out of the invoices.

Q. Have you got the detailed worksheets where you went over the separate invoices? A. Yes.

Q. Where are those?

A. Mr. Winter has them.

Q. Will you produce those, please?

Mr. Winter: (Hands document to the witness.)

Q. Now, what are these documents that Mr. Winter has handed you?

A. These represent the actual figures taken off, month by month, from the invoice books as given to us.

Mr. Winter: You have the invoices here, Mr. Jones?

Mr. Jones: Yes, we have just a small portion here but we have the rest of them available.

(Testimony of Phillip Evans.)

Q. I was wondering, Mr. Evans, if these showed the invoice numbers, so they can be identified and tied up with the invoices. They do, don't they?

A. Yes, invoice numbers and dates.

Q. Now, did you find any records for the period in 1932 and 1933?

A. It is my recollection, there were no records available for that period. [69]

Mr. Winter: Just refer to your report, if you need to, Mr. Evans.

Q. Yes, if you want to look at the report to refresh your recollection, you may do it. If that was the case, what basis did you take as to the assessment of any tax or setting up any assessment for that period for which no records were available?

A. If I remember rightly, that was set up upon agreement, based upon the ensuing years.

Q. That is, you applied the figures that you found in periods subsequent to 1933 back for the period 1932 and 1933, in some way, did you?

A. Let's see if I get that right. We took the figures for 1932 and applied them in proportion as ordinarily would be when it was admitted the business was practically the same, same proportion, same amount of business and it was admitted, it seems to me at that time, it was admitted that would be a fair assessment.

Q. When you say it was the same kind of business and in the same proportion, what do you mean by that? that is was the same in 1932 and 1933 as it was in 1935 and 1936? A. Yes.

(Testimony of Phillip Evans.)

Q. And did your investigation show that to be a fact?

A. We couldn't prove it, because the records weren't available.

Q. Well, did your investigation show that the business was the same in 1934 and 1935? where you had records, as it was in 1935 and 1936?

A. Well, I would have to go through these and compare them and see how they grew. [70]

Q. I don't mean in amounts but character of the business?

A. The character was about the same.

Q. Did you find anything except the matter of connecting rods involved?

A. Well, sir, that is about five or six years ago, but I do think there were a few other items involved, where they were characterized as "exchanges."

Q. Could you tell me what they are or pick them out?

A. Well, I would have to go through these detailed slips and see but I don't think that this information we have got here——

Q. (Interrupting) Maybe I can shorten this, Mr. Evans, if I can ask Mr. Trace one question from where he is.

Mr. Jones: Mr. Trace, was there anything except connecting rods involved in the assessment for 1932 to 1935?

Mr. Trace: Nothing that I know of.

(Testimony of Phillip Evans.)

Mr. Winter: I don't think there were, Mr. Jones, we will concede there were nothing else.

Mr. Jones: I just wanted to make the record clear on that.

Mr. Winter: No assessment there for armatures.

Q. You don't need to bother any further on that, Mr. Evans, you looked at the invoices or copies of the invoices that the Company kept, of course?

A. Yes.

Q. Did you find, in any case, that they billed any customer with any amount as tax on the sales?

A. I don't remember; on the other hand, it seems to me I do remember they had records with the tax being on, some of those invoices. [71]

Q. But you don't remember?

A. No, I wouldn't want to go on record.

Q. Did you make any report whether they had passed the tax on or not? A. No, I didn't.

Mr. Winter: What was that?

Mr. Jones: I asked him if he made any report whether they had passed the tax on or not.

Q. Did you investigate the physical operations involved in the repair or rebabbi*t*ing of connecting rods? A. Well, a casual one.

Q. Did you notice whether there was any difference in the operations between the period from 1932 to 1935 and the period of 1935 and 1936?

Mr. Winter: What do you mean by "operations"?

Q. Mechanical and physical—of rebabbi*t*ing operations?

(Testimony of Phillip Evans.)

A. Operation, 1932 and 1934—we had no way of connecting up; we had kind of a visit to the workshop, more as a "visit" than anything else, just to see what they were doing. Now, at this time, I couldn't tell you exactly what the procedure was.

Mr. Jones: That is all. I would like to have these worksheets marked and offer them as an exhibit or at least to have them at this time marked for identification.

Mr. Winter: Aren't the records the best evidence? These are merely taking copies from the records.

Mr. Jones: This is the basis on which the Government is setting up this tax. I want to use them as a matter of reference, to determine the correctness of the tax, that is their own record of the tax basis. [71a]

Mr. Winters: That is, record invoice numbers which they add up.

Mr. Jones: I am not offering this to prove the transaction represented by the invoice, I am—in fact, I am not offering it at all now but I would offer it to prove the basis of assessing the tax and our records don't show that; I would like to have them identified.

The Court: You can get anything identified you want to.

Mr. Winter: Yes.

Mr. Jones: When that question comes up later. That is all, Mr. Evans.

(Testimony of Phillip Evans.)

The Court: Do you want to mark them now?

Mr. Jones: Yes, if the Clerk will mark those for identification, please.

The Clerk: Mark it plaintiffs' or defendant's?

Mr. Jones: Plaintiffs' 1.

The Court: You describe those as "worksheets"?

Mr. Jones: I understand that they are the Agents' worksheets and working records, forming the basis for the assessment of the tax.

The Clerk: Plaintiffs' exhibit No. 1.

Plaintiffs' Exhibit No. 1, the worksheets just referred to, marked for identification.

Cross Examination

By Mr. Winter:

Q. Mr. Evans, will you refer to your original report and just state to the Court when you made the investigation and what period of time it covered? [72]

A. Your Honor, we went in there in 1935.

Q. About when?

A. In, about August, latter part of 1935.

Q. What is the date of your report? Is this your signature here? A. November 6th.

Q. You made a report, November 6th?

A. November 6th.

Q. Prior to that time, as I understand you, Mr. Evans, you took the sales-slips of the Con-Rod Exchange and you examined each and every one of those sales-slips, did you? A. Yes.

Q. For the period 1934 and 1935? A. Yes.

(Testimony of Phillip Evans.)

Q. There were no records for 1932 and 1933?

A. No, sir.

Q. And upon your findings, from those records, you determined, did you not, the exchanges of the so-called "exchanges" of Con-rods during that period? A. That is my recollection.

Q. And how did you arrive at the amounts which you set forth, statement of the sale, the exchange, forging and the total?

A. How did we arrive at it?

Q. Yes?

A. We took the figures shown on the sales-slip.

Q. Figures shown on the sales-slip, yes.

A. Then furnished a schedule of forging prices.

Q. Was that a schedule of "Con-Rod Exchange", nationally advertised? [73]

A. It was given to us in mimeographed form, if I remember right.

Q. You also have a mimeographed form?

A. Yes, mimeographed list, that is all typewritten list—we were told those were figures to apply on cost of forging.

Q. And you applied those as the cost of forging in each instance?

A. Yes, on each individual sale.

Q. Were you furnished with a statement or a list of the prices of the piston Service Company, do you recall?

A. No, sir, not at the time we were making settlement of the Con-Rod, we hadn't approached the Piston Service.

(Testimony of Phillip Evans.)

Q. Well, did you have any price list of any other Con-Rod Companies? A. No, sir.

Q. (Indicating) Are these the sheets which you refer to? A. Yes.

Q. Is that the typewritten copy, mimeographed copy, you got?

A. That looks like it; there were some others, you have some more in your hands.

Mr. Winter: (Hands document to the witness.)

Q. Those sales prices were all furnished to you——? A. (Interrupting) By the Company.

Q. By the Company? who furnished them to you?

A. From the office.

Q. Mr. Taylor or Mr. Seward?

A. From Mr. Seward's office, Miss Morgan, I forget her name, it was furnished at the same time we went down to get the books, sales books which were all bound monthly books. [74]

Q. And you used those figures from those sheets to arrive at the sales prices and cost of the forgings?

A. Yes, that is how we put up our worksheets.

Q. Wherever you found, on the records what appeared to be a repair job or where——?

Mr. Jones (Interrupting): Mr. Winter, those papers you showed him, would you keep them separate? I am going to ask him to identify them. We may want to refer to them.

Q. Wherever you found on the records what indicated to you to be a repair job, did you include any of those items in your amounts to arrive at the taxes which you recommended for assessment?

(Testimony of Phillip Evans.)

A. At this time, my recollection is, we put nothing on our worksheets except such items as were marked with "exchanges."

Q. What does the little item "p", does that refer to "piston" Service?

A. Let's see, if I remember rightly again, that "p" was put there, I think that was put there to avoid a repetition of the taxes applying to the Piston Service. Now, that is my recollection of it.

Q. You excluded all sales, did you not, or did you exclude all sales to other jobbers who were not considered to be manufacturers?

A. Yes, where contemplated going there to set up assessments there trying to eliminate duplicate taxation.

Q. Did you make an investigation in later years with Mr. Prine? A. I did.

Q. Was there any difference in the percentage of business [75] which is shown on the records in later years or what was the percentage of the business shown by the records in later years and in former years with respect to so-called exchanges and so-called repair jobs after—? I am referring to after the period in 1935, when the inserts came into use? A. I don't remember.

Q. You don't remember?

A. Except the business might have gone down, but I couldn't tell you what the respective percentages was in comparison, those previous years.

Q. Did you make an investigation for the period

(Testimony of Phillip Evans.)

from 1936 to 1938 or was there any investigation made at that period?

A. There was a later investigation.

Q. Well, you are referring to the investigation for 1935 and 1936? A. Yes.

Q. But after that, you didn't go in there after 1936?

A. I was only there on two occasions, two periods is all. Yes, that must be the second one.

Q. Well, it has been stipulated, I think, been agreed that later period was upon returns filed by the taxpayer?

Mr. Jones: Yes, upon returns filed by the taxpayers, and those are true exchanges, the third period.

The Court: Those returns were filed, 1937——?

Mr. Jones (Interrupting): They were filed in 1936, 1937, 1938, as I recall it.

Mr. Winter: That is all. [76]

Mr. Jones: After this audit was made and then they made the returns and included in those returns items that were strictly exchanges, which we contended were not taxable and which Judge Yankwich found not taxable, but now, under the Armature Exchange Case would be considered taxable.

The Court: Do you know when the brief was filed, complaint was filed in the case Judge Yankwich decided?

Mr. Winter: The 13th of January 1937, subscribed to.

(Testimony of Phillip Evans.)

Mr. Jones: 24th of January 1938.

Mr. Winter: I think that is about when it was filed.

Mr. Jones: Issuance of the subpoena or process. The complaint bears the Clerk's endorsement, of filing on January 24th, 1938.

Redirect Examination

By Mr. Jones:

Q. Mr. Evans, I wonder if you recall that these invoices bore on them a notation in pencil, some notation indicating that they were exchages of connecting rods in cases marked—E—X—Conrod—something like that? A. Yes.

Q. Now, didn't the parties there at the plant representing the plaintiffs tell you that that was just a method they followed for their own records and many of those marked "exchanges" were not true exchanges but were, in fact, repairs, didn't they tell you that at the time you were [77] making your audit?

A. I think in our first conversation, the contention was held all that work was repairs.

Q. Well, now, when you made your audit, did you go into each item with the parties or did you set it down according to what the notation was on the invoice?

A. We set it—we set up our worksheets on the basis of those invoices plus those memorandum sheets, showing the value of the forgings; occasionally, we would call in the company officials and in-

(Testimony of Phillip Evans.)

vite them to scrutinize it so they could follow our procedure and they were satisfied with our procedure.

Q. Now, who was it said he was satisfied with your procedure?

A. That is satisfied with the way in which we were making it out.

Q. Wasn't there, in fact, now, quite a bit of dissatisfaction about your putting down in your assessment sheet items as being exchanges just because they said on the face of the invoice it was "x-Con-rod"?

A. Yes, there was considerable objection.

Q. They said, as a matter of fact, you were putting down items that were really repairs?

A. That is what they considered them, yes, that is true.

Q. And in making up your worksheets, you went according to the invoices and if they showed on their face "x-Con-Rod" you put it down as an "Exchange", is that right? A. That is right.

Mr. Jones: That is all. I would like to [78] have the sheets——

Recross Examination

By Mr. Winter:

Q. The invoices showed repairs, of course you excluded from your——?

A. (Interrupting) Yes.

Q. They contended, as I understand, that all—whether exchanges or repairs—all were non tax-

(Testimony of Phillip Evans.)

able items, that is what their contention was?

A. Non taxable, inasmuch as they were repairs.

Q. Of course; did they make a contention with respect to the exchanges, also? contended they were "repairs"? A. Yes.

Q. No distinction was made?

A. No distinction was made.

Q. Did you make an investigation as to customers or as to the amount of business which were exchanges and which were repairs?

A. Yes, we did.

Q. What did you find?

A. We found that in cases where we were told they were repairs, we investigated among the customers and found that in all instances, it wasn't the rods that they sent up that came back, the rods came back to them over the counter and they eventually had to make good with old forgings, after dismantling of the car.

Q. And what percentage of the business would you say, from the records, showed which were exchanges and which were——?

A. (Interrupting) In all those cases, they were exchanges and made on the basis of turn-in of old forgings. [79]

Q. There were, however, some so-called "repairs" in the records were there?

A. There were some invoices, I remember, at this time in which they spoke of "repairs" but whether repairs spoken of, we didn't include them in the worksheet.

(Testimony of Phillip Evans.)

Mr. Winter: That is all.

ReRedirect Examination

By Mr. Jones:

If it showed on the invoice "repairs", you didn't include them in your worksheets?

A. That is right.

Q. If it showed on the invoice "x-Conrod" you remember that? A. Yes.

Q. If it showed that, you considered that, definitely, an "exchange" without investigating the facts?

A. Yes.

Mr. Jones: That is all.

Reredirect Examination

By Mr. Winter:

Q. I thought you said you investigated some of those cases to find out whether they were?

Mr. Jones: He said a few.

Q. You investigated a few of those cases to find out the facts? A. Yes.

Mr. Jones: Will you let us have a few of those sheets, Mr. Winter? I am looking for those price-lists on the exchanges you identified. [80]

A. Forgings, Mr. Winter has them.

Mr. Winter: I put them on that exhibit there. (Indicating Exhibit No. 1) Here they are. (Indicating)

Mr. Jones: Then let them go in the identification, as a part of that exhibit.

That is all of my evidence.

(Witness excused)

RICHARD S. SEWARD,

called as a witness on behalf of the plaintiffs herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. State your name?

A. Richard S. Seward.

Q. You are one of the plaintiffs in this case, Mr. Seward, as a liquidating trustee of Con-Rod Exchange? A. Yes.

Q. And what was your connection with the Con-Rod Exchange?

A. I owned a portion of the stock in it.

Q. And you were an officer in it? A. Yes.

Q. What office did you hold?

A. I believe I was Vice President, one time; later, I was President.

Q. Now, are you familiar with the physical and mechanical operations that were used in the repair or rebabbiting of connecting rods?

A. Quite so. [81]

Mr. Winter: We will concede that the facts with respect to the actual manufactory, or repair, whichever you wish to call it, as set forth in Judge Yankwich's opinion, pertain to this period; I mean, the actual manufacture.

Mr. Jones: All right.

Mr. Winter: I am limiting to that, so I think the Court is familiar with the facts set forth——

Mr. Jones (Interrupting): I want to ask the witness one further question, then.

(Testimony of Richard S. Seward.)

Q. State whether or not, in charging or billing these items you at any time, or the Con-Rod Exchange, any time, included the tax or added on the tax on the invoice?

Mr. Winter: I object to that as calling for a conclusion. I think he can state just how he did bill—then it is up to the Court.

Q. State the fact about the billing, particularly with reference to the inclusion of any tax?

A. There was no tax added, if that is what you mean?

Q. That is what I mean.

Mr. Winter: We object to that as not responsive and a conclusion of the witness.

The Court: Motion denied.

Mr. Jones: That is all.

Cross Examination

By Mr. Winter:

Q. How did you arrive at your invoice price on your connecting rods, did you use the nationally advertised rod catalog or price list, isn't that a fact that you [82] did use a nationally advertised——?

A. (Interrupting) We took the prices from some of the locally advertised connecting rod prices; others, we just made—took them from the general market.

Q. You didn't bill the tax as a separate item or any tax as a separate item on your bills?

A. No additional tax.

(Testimony of Richard S. Seward.)

Q. But you accepted those prices of Clawson & Bals?

A. I never saw Clawson & Bals' prices.

Q. Whose did you use?

A. Pacific Coast concerns more—I don't know—Federal, Mogul, one other—one, I have forgotten, it was some concern in San Francisco.

Mr. Winter: That is all.

Redirect Examination

By Mr. Jones:

Q. State whether or not, at any time, prior to the audit that was made by the Agent here, you considered that any tax was due or claimed in connection with these transactions?

A. I never knew there was a tax until they came to us.

Mr. Jones: That is all.

Mr. Winter: That is all.

(Witness excused) [83]

L. HICKS TAYLOR

called as a witness on behalf of the plaintiffs herein being first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. State your name?

A. L. Hicks Taylor.

(Testimony of L. Hicks Taylor.)

Q. And your business?

A. Public Accountant.

Q. What connection, if any, have you had with the Con-Rod Exchange?

A. Been Auditor for them since 1924.

Q. How closely have you kept in touch with the details of their business? A. Quite close.

Q. You make periodic visits to their plant, do you? A. Three, four, five times a year.

Q. Are you familiar with their methods of billing? A. I am.

Q. Are you familiar with their method of billing, with respect to exchanges or repairs of Con-Rods, during the period of 1932 to 1936?

A. From 1934 to 1936, I am familiar with it.

Q. State whether or not—or, state the fact with reference to the addition or inclusion of tax in the bills?

Mr. Winter: The bills are the best evidence of what they show.

The Court: The objection is sustained.

Mr. Jones: If Your Honor please, we can't very well go back to our customers and bring in the bills we may have submitted to them; they are not a part [84] of our records; if we sent a bill to a customer, we have no way of keeping that bill, but I think it is permissible to establish as a basic fact, it was not the practice of the office to include any tax on the bills or add it on to the bills.

The Court: He can testify what he saw. You are

(Testimony of L. Hicks Taylor.)

asking about bills. This man probably never saw a bill.

Mr. Jones: I appreciate, as to what the bill showed.

Q. Do you know what the practice of the Con-Rod Exchange was with reference to billing to its customers any tax on these Con-Rod exchanges or repairs?

Mr. Winter: The same objection.

Q. Just whether you know the practice or not.

The Court: Yes or no.

Q. Do you know their practice as to billing or not billing the tax?

A. They don't bill the tax.

Mr. Winter: I ask that be stricken.

Q. State whether you know the practice? Don't state what it is. If you know their practice?

A. The practice is——

The Court (Interrupting): Answer that question, whether you know. He is going to object——

Q. (Interrupting) I just asked whether you know what the practice was, not state what the practice was, but whether you know what the practice was? A. Yes.

Q. Then, I will ask you to state what the practice was? [85]

Mr. Winter: I object to that as not the best evidence.

The Court: Let him answer, to see how he arrived at that conclusion. It may be he can have some legitimate way to arrive at that conclusion.

(Testimony of L. Hicks Taylor.)

A. Our retained copies don't show any tax added.

Mr. Winter: I object to that and ask that it be stricken, he is talking about "copies", not the originals which are the best evidence.

Q. What do you mean by "retained copies"?

A. Exact duplicates of billing, we retain a copy of an exact billing and those duplicates don't show tax added.

The Court: I will overrule the objection.

Mr. Jones: That is all.

The Court: I will say, Mr. Jones, I don't think this testimony is of very great weight.

Mr. Jones: Mr. Seward already categorically——

The Court (Interrupting): Mr. Seward testified —as far as the accountant knows, they might have included it in the price and the accountant not know —all he is testifying to, what the records show on their duplicates; when they made out the bill, they didn't say "plus 10 percent tax" added.

Mr. Jones: I relied on Mr. Seward's testimony. I thought as Mr. Taylor was here, I would put him on.

That is all.

Mr. Winter: That is all.

(Witness excused) [86]

Mr. Jones: I offer the records in the previous case, Con-Rod Exchange, Inc. v. Henricksen, No. 8570, being Cause No. 8570, the records being the following: Pleadings and instruments, the amended

complaint, defendant's answer to the amended complaint, the opinion of the Court, the findings of fact and conclusions of law and the judgment.

Mr. Winter: We will object to it on the grounds that it is irrelevant and immaterial, not binding on the defendant in this case and that further, that the decision has been overruled by the Circuit Court of Appeals in the 9th Circuit, in effect, of the Armature case.

The Court: You are offering them as one exhibit?

Mr. Jones: Yes.

The Court: Plaintiff's 2?

Mr. Jones: Yes.

The Court: It may be admitted.

Plaintiff's Exhibit No. 2, Cause No. 8570, last above referred to, admitted in evidence and made a part of the record herein.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8570

CON-ROD EXCHANGE, Inc., a corporation,
Plaintiff,

vs.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,
Defendant.

Plaintiffs Exhibit No. 2 (Continued)

AMENDED COMPLAINT

Comes now the plaintiff and for its cause of action against the defendant alleges:

I.

That the plaintiff, Con-Rod Exchange, Inc., at all times hereinafter mentioned, was and now is, a corporation, organized, existing and doing business under and by virtue of the laws of the State of Washington, and that it has paid all fees due the State of Washington, including the license fee last past due. That its principal place of business is within the judicial district of the above-entitled court. That it is a citizen of the United States; and that it has at all times borne true allegiance to the Government of the United States, and that it has not in any way voluntarily aided, abetted or given encouragement to rebellion against said United States. That it is justly entitled to the amount herein claimed from the United States and that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made.

II.

That the defendant at all times hereinafter mentioned and since the 11th day of July, 1936, was and still is the Acting Collector of Internal Revenue of the United States for the Collection District of Washington, having an office and residing at Tacoma, Pierce County, within the above-entitled

Plaintiffs Exhibit No. 2 (Continued)

district, and that said defendant now is a citizen of the State of Washington, Pierce County therein.

III.

That for the period from October 1, 1935, to August 31, 1936, plaintiff paid to the said defendant any and all manufacturers' excise taxes due to the defendant or to the United States of America under Section 606(c) of the 1932 Revenue Act; that on or about April 27, 1936, the defendant, acting under the instructions of the Commissioner of Internal Revenue, notified the plaintiff that it was liable for a further assessment under the provisions of the said section of said Act, in the sum of $234.84 additional tax, and $11.74 penalty. That thereafter, acting under the authority of the Commissioner of Internal Revenue, the defendant, on the 26th day of August, 1937, required the plaintiff to, and thereupon it did, pay to the defendant the above set-forth sums, together with interest of $8.22, or a total payment of $254.80; and that on or about the same day, August 27, 1937, plaintiff duly filed with the defendant for transmission to the Commissioner of Internal Revenue its claim for refund and repayment of said amount, a full, true and correct copy of which claim is attached to the original complaint of plaintiff herein, marked Exhibit "A", and is by this reference made a part hereof and incorporated herein as fully as though set forth herein; that thereafter under date of November 10, 1937, the

Plaintiffs Exhibit No. 2 (Continued)

Commissioner of Internal Revenue, in writing, notified plaintiff that such claim was disallowed and rejected, a copy of which letter is attached to the original complaint of plaintiff herein, marked Exhibit "B", and is by this reference made a part hereof and incorporated herein as fully as though set forth herein.

IV.

That the plaintiff is engaged in the business of repairing automobile parts in the City of Seattle, King County, Washington; that the transactions upon which the tax above referred to was assessed were not sales of goods manufactured or produced by the plaintiff within the intent and purpose of Section 606 of the Revenue Act of 1932, but were repairs made to automobile connecting rods, which connecting rods at no time lost their identity as such and were thereafter re-installed in automobiles; and that the assessment of manufacturers' excise tax upon such connecting rods was wrongful, illegal and unwarranted, and plaintiff is entitled to the return thereof, together with interest.

V.

That the charge made by the plaintiff for repairing automobile parts was not changed or altered in any respect because of the assessment of the tax, refund of which is now being asked, and that the plaintiff did not include the tax in the price or charge of the repaired article, with respect to which

Plaintiffs Exhibit No. 2 (Continued)

it was imposed by the defendant, nor was the amount of the said tax collected, directly or indirectly, from the customers or vendees.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $254.80, together with interest thereon from and after the 26th day of August, 1937, at the rate of six per cent per annum until paid, together with its costs and disbursements herein.

WRIGHT, JONES & BRONSON
Attorneys for Plaintiff.

United States of America
Western District of Washington
Northern Division—ss.

Richard S. Seward, being first duly sworn, on oath deposes and says: That I am the president of the Con-Rod Exchange, Inc., a corporation, plaintiff above named; that I make this verification for and on its behalf, being thereunto duly authorized; that I have read the within and foregoing amended complaint, know the contents thereof, and believe the same to be true.

RICHARD S. SEWARD

Subscribed and sworn to before me this 18th day of March, 1938.

[Seal] A. P. BOWES
Notary Public in and for Washington, residing in Seattle.

Plaintiffs Exhibit No. 2 (Continued)

Copy received this 19th day of March, 1938
THOMAS R. WINTER

[Title of District Court and Cause.]

DEFENDANT'S ANSWER TO AMENDED COMPLAINT

First Defense

The plaintiff's amended complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in Paragraph I of plaintiff's amended complaint except defendant denies that the plaintiff "is justly entitled to the amount herein claimed from the United States".

Defendant admits the allegations contained in Paragraph II of plaintiff's amended complaint.

Defendant admits the allegations contained in Paragraph III of plaintiff's amended complaint except defendant denies that "for the period from October 1, 1935, to August 31, 1936, plaintiff paid to the said defendant any and all manufacturer's excise taxes due to the defendant or to the United States of America under Section 606(c) of the 1932 Revenue Act".

Defendant denies the allegations contained in Paragraphs IV and V of plaintiff's amended complaint.

Plaintiffs Exhibit No. 2 (Continued)

Wherefore, defendant, having fully answered plaintiff's amended complaint, prays that the action be dismissed with costs to the defendant.

OLIVER MALM
Ass't United States Attorney.
J. CHARLES DENNIS
United States Attorney.

United States of America
Western District of Washington
Southern Division—ss.

Oliver Malm, being first duly sworn on oath, deposes and says that he is a duly appointed, qualified and acting Assistant United States Attorney for the Western District of Washington, Southern Division, and as such makes this verification for and on behalf of the defendant; that he has read the above and foregoing Answer to plaintiff's Amended Complaint, knows the contents thereof and that all the facts therein stated and allegations therein contained are true.

OLIVER MALM
Ass't United States Attorney

Subscribed and sworn to before me this 30th day of November, 1938.

[Seal] E. REDMAYNE
Deputy Clerk, United States District Court.

Copy received this 30th day of Nov. 1938
H. B. JONES
Atty. for Pl.

[Endorsed]: Filed Nov. 30, 1938.

Plaintiffs Exhibit No. 2 (Continued)

[Title of District Court and Cause.]

OPINION

Appearances:

For the Plaintiff: Wright, Jones & Bronson
Seattle, Washington

For the Defendant:
J. Charles Dennis, U. S. Attorney
Oliver P. Malm, Thomas R. Winter
Deputy U. S. Attorneys
Seattle, Washington

Yankwich, District Judge:

Plaintiff seeks to recover the sum of $254.80 paid upon a further assessment, under Section 606(c) of the Revenue Act of 1932 (Chapter 209, 47 Stats. 262), for the period from October 1, 1935, to August 31, 1936, made on the sale of automobile connecting rods, which the plaintiff rebabbitted and sold. A claim for refund, duly made by the plaintiff, was rejected by the Commissioner of Internal Revenue on November 10, 1937.

The rebabbitting consisted in applying a metal alloy to the inside and edges of the bearing formed by the detachable cap and the large end of the shank of the rod. The method of doing the work was, in substance, this: Plaintiff purchased shanks from wrecking houses, either in Seattle or elsewhere, to establish a stock in a particular type of connecting rod. After a stock was once established, individual customers would bring in used shanks for rebabbitting. If the plaintiff had in stock a rebabbitted

Plaintiffs Exhibit No. 2 (Continued)

connecting rod of the same size and type as the customer's, it was given in exchange to the particular customer. In the case of new automobile models, with new types of connecting rods, the plaintiff would purchase some new connecting rods from the automobile manufacturers. To rebabbitt the rod a used forging or shank, after the cap and the shank had been separated, was placed in a container of hot babbitt, which would melt off and dissolve the old babbitt still adhering to the old forging. The forging was then placed in an acid solution which cleaned off all grease and dirt. Then the new alloy was applied to the bearing by pouring, after which the surface of the new babbitt was evened so that the cap and the shank would fit together again. The inside of the new babbitted bearing was rough-bored to a size slightly smaller than what was to become the finished diameter, then a broaching occurred, which, finally, resulted in providing the prescribed diameters. The connecting rods were then placed in plaintiff's stock. (1)

It is the contention of the Government that the tax was properly collected, because the process of rebabbitting is one of manufacture.

I had occasion recently to consider the meaning of the words "manufacturer" and "producer" in Section 606(c) of the Revenue Act of 1932, in Armature Exchange, Inc. v. United States, 1938, D. C. Cal, 28 Fed Sup 10. I there held that the rewinding of automobile armatures was merely the repair or

Plaintiffs Exhibit No. 2 (Continued)

restoration of an article to its original state and not the "production" or "manufacture" of a new article.

It is the contention of the Government that the reasoning behind that decision does not apply here. Granting that my conclusion was correct, as to armatures, the Government insists that the process of rebabbitting, as here described, is really a process of manufacture and production of a new article from a shank which was nothing but scrap material.

The Government relies strongly upon Clawson & Bals, Inc. v. Harrison, D. C. Ill., Nov. 1938, 394 C.C.H. 9219.

I had occasion to comment on that decision in the foot note to the opinion in Armature Exchange, Inc. v. United States, supra. It is grounded upon a broad definition of "manufacture", which, to my view, is not warranted by the decisions on the subject.

In a case like this, where no binding precedents from higher courts exist to guide us, the resort to definitions is very helpful. But even that must be subordinated to the final, pragmatic test,—namely, the visual contrast between the appearance of the article before the process is applied to it and its appearance after the process is completed.

There is in evidence a used connecting rod in the form in which it usually comes to the plaintiff and a rebabbitted rod, after it has been processed by it. A look at the two shows that there has been no

Plaintiffs Exhibit No. 2 (Continued)

change in shape or identity of the rod. Its dimensions have remained the same. The only new part is a thin layer of metal alloy which has been applied to the bearing, smoothed out and the edges evened, so that the bearing will have the holding quality which had been lost in the old one through the wearing off of the old babbitt. The function of the shank is still the same. The operations are simpler than the operations resulting in the rewinding of armatures. The result achieved is less of a structural change than takes place when old armatures are rewound.

Occasionally, it is true, the bolts which connect the cap to the shank are replaced by bolts actually purchased by the plaintiff. But the business in which it is chiefly engaged is that of replacing the worn-out babbitt in the bearing of a new babbitt.

Whether we apply to the article which is finally sold the test of identity of structure or identity of function, the result is the same.

We do not have here a process of manufacture or production of an article of commerce. We have merely a process of renewing, for further use, a standard article of commerce,—an automobile part,—by resurfacing a worn-off portion of it with a thin layer of metal alloy, which, in all probability, does not enhance its weight by more than a few ounces.

> "Manufacture is transformation,—the finishing of raw materials into a change of form for use." (Kidd v. Pearson, 1888, 128 U. S. 1, 20)

Plaintiffs Exhibit No. 2 (Continued)

Here, there is no change of form, identity or function. The rehabilitated article is not a new article but one which has been restored to its original shape and use by the mere replacing of the worn off surface on part of it.

Certainly, if a retreaded tire in which the worn-off surface is replaced, so as to add four and one-half to five pounds weight over and above what the new tire weighed is not a process of manufacture (Skinner v. United States, 1934, 8 Fed Sup 999), the replacement of a thin film of metal which does not add more than a few ounces to the weight of the connecting rod is not manufacture. (See: Hempy-Cooper Mfg. Co. v. United States, 1936, 18 American Federal Tax Reports, 1313; Bardet v. United States, 1938, Prentice-Hall Federal Tax Current Court Decisions for 1938, Par. 5, 507).

It is unimportant that the connecting rod without the rebabbitting is useless as a connecting rod. And that through the process, something is made serviceable which was not so before, does not make the process one of manufacture. To consider "manufacturing" any process aiming to "make a serviceable product" (as does Judge Barnes in Clawson & Bals, Inc. v. Harrison, supra) would call for inclusion of all repairing.

For the function of repairing is to make useable an article which without it could not be used. A frying pan without a handle is useless as a frying pan. So is a chair in which the seat or a leg is

Plaintiffs Exhibit No. 2 (Continued)

broken. The workman who adds a new handle to a pan, or repairs the seat or leg of a chair by replacing the worn out portion with new materials, in effect, takes something out of a scrap heap or a junk pile and restores it to usefulness.

Still we would be doing violence to the English language if we called these acts of repairing acts of manufacture.

The rehabilitated connecting rod competes in the open market with new connecting rods. And were we dealing with a sales tax it could be held that, regardless of method of production, the ultimate act is a sale in both instances. But the tax assessed is an excise tax, not a sales tax.

It is imposed on the sale only if the seller is a producer or manufacturer.

The final test is, therefore, not whether there was a sale, but whether there was a sale by a manufacturer or producer.

In my view, the plaintiff was not a manufacturer or producer either when it rebabbitted rods brought in by others and returned the identical rod (as it did in 75 per cent of its sales during the period) or when it exchanged an old rod on which the babbitt had worn off for a newly rebabbitted one (as it did in 25 per cent of its sales).

The assessment was, therefore, illegally levied.

Section 621 of the Revenue Act of 1932 reads (in part):

> "(d) No overpayment of tax under this title shall be credited or refunded (otherwise

Plaintiffs Exhibit No. 2 (Continued)

than under subsection (a), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) *that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee,* or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund." (Italics added)

The object of provisions of this character is to prevent unjust enrichment by taxpayers who might seek recovery of a tax which had been absorbed into the price of the article sold. Rightly. For if the taxpayer has shifted this tax onto others, they and not he paid it. And the tax refunding statutes, being equitable in nature, the law would be aiding inequity if it allowed recovery by one who, although he has, apparently, paid the tax, has, actually, forced another to do so. (United States v. Jefferson Electric Co., 1934, 291 U. S. 386, 402; Union Pacific Packing Co. v. Rogan, 1937, D. C. Cal, 17 Fed Sup. 934, 942; Anniston Mfg. Co. v. Davis, 1937, 301 U. S. 337. 348; White Packing Co. v. Robertson, 1937, 4 Cir. 89 Fed (2) 775, 780-81).

The evidence shows that the sales of rebabbitted rods were made at prices fixed by larger competi-

Plaintiffs Exhibit No. 2 (Continued)

tors who published, regularly, price lists. This was maintained at all times. Even after the audits made by the agents of the Internal Revenue Department and which resulted in the additional assessment, no change was made to include the additional taxes that might be assessed against them. An executive officer of the plaintiff testified positively that at no time was the price fixed by himself or anyone connected with the company so as to include the tax.

Some of the price lists which the plaintiff sought to meet show that the particular competitor had included the excise tax in the price. There is no showing that plaintiff was aware of that fact. But even if there were, it could not be held to outweigh the positive statements that a possible excise tax was not in contemplation when the price was fixed.

Two merchants may sell the same article at the same price, and yet entirely different elements might enter into the determination of the price. A large dealer, engaged in rebabbitting on a national scale, with a large factory doing the repairing, would have a lower cost, enabling him to absorb the excise tax and still compete with a smaller dealer, like the plaintiff, whose cost of production must be higher and who does not absorb the tax. So the argument from identity of *price of* little help.

I am of the view that the plaintiff has satisfied the requirement of the section and has shown that the tax was not passed on to the consumer.

Plaintiffs Exhibit No. 2 (Continued)

Judgment will be for the plaintiff as prayed for in the Complaint, subject to correct computation of amounts to be made by the parties.

Dated this 17th day of August, 1939.

LEON R. YANKWICH,
United States District Judge.

Note 1:

There is no disagreement between the Government and the taxpayer, either as to the nature of the work done on the rods by the plaintiff or the structural result.

The Government's brief has this description:

"The connecting rods . . . . are steel forgings consisting of a shank and a cap and two bolts with nuts uniting the said shank and cap. The larger end of the rod contains the bearing, consisting of a babbitt alloy integrally cast and permanently bonded to the shank and cap of the rod. The babbitt alloy being a soft metal, the bearing in use is subject to destruction by reason of cutting, wearing and burning out. The plaintiff corporation removes the destroyed babbitt alloy from the shank and cap, leaving the shank and cap in its entirety. Babbitt alloy is then replaced in the shank and cap, and after the refilling with the babbitt, the babbitt alloy is machined to obtain a smooth surface, and is clamped or fastened into the shank and cap with the original screws.

In some instances, a process of 'rebushing' is necessary in the small end of the connecting rod,

Plaintiffs Exhibit No. 2 (Continued)

and when necessary new bolts and nuts and shims are supplied."

[Printer's Note: Here follows Findings of Fact and Conclusions of Law which is set out at page 20 and Judgment which is set out at page 31 of this printed record.]

[Endorsed]: Filed Aug. 17, 1939.

Mr. Jones: As far as the issue of res judicata, that is all the evidence we will have on that point, and if we can submit that issue, then the matter of going into these details, the parties can get together on it and see what they can do on it.

The Court: Mr. Winter, do you have any testimony on this question? [87]

Mr. Winter: No, your Honor, except I take it the Court will take judicial notice of the decision of the Circuit Court of Appeals in the Armature Case? If that is understood, I won't offer it.

The Court: Yes.

Mr. Jones: Your Honor, will you take a recess during the course of the morning?

The Court: I take short recesses. I thought you could bring the gentlemen in and the records and I will give them a room. * * *

We will take a recess until you gentlemen inform me you are ready on the next case. Then

try to get this, so by Noon, they will be able to report back.

Recess.

Mr. Jones: After conferring in this matter, Your Honor, we have decided on the disposition of the details of this. If the rule of res judicata applies, then of course, it really doesn't make any difference how much of this is exchange and how much repairs, because it all falls under the previous decision and the plaintiff is really the one taking the chance on not making up that record and, confronted with a number of these transactions, we decided that it was just too much to endeavor to go into it and we are going to present no evidence on that point, except on one phase of it and that is to show how much of the assessment relates to the period where there were no records and where the witness said there was just [88] an estimate, based on what was found in other years and carried back; that might have some bearing if the res judicata should be overthrown.

We will ask Mr. Evans to take the stand and establish that point and then we will just introduce no evidence on the other.

PHILLIP EVANS,

recalled.

Direct Examination

By Mr. Jones:

Q. You have been sworn. Just take the stand. I want to have you state for the purposes of the rec-

(Testimony of Phillip Evans.)

ord, how much of the tax that you set up against the plaintiffs was for the period when there were no records and what is based on purely an estimate, as you said in your earlier testimony? I think that sheet will show, that is taken from the Plaintiffs' Exhibit 1. (Indicating)

A. The period we set up on an estimated base was the years 1932 and 1933.

Q. And how much was the amount of sales that you estimated for that period as subject to taxation?

A. Amount of sales for 1932 was $10,015.97.

Q. And for 1933?

A. For 1933, it was $18,977.64.

Q. And how much were the taxes based on those estimates?

A. The taxes for 1932 was $200.31 and the penalty was $50.09.

Q. Was there a figure for interest, also?

A. There was a figure for interest also, $67.47. [89]

Q. What was the tax penalty and interest for 1933?

A. 1933, the tax was $379.56, the penalty $94.90 and the interest $92.99.

Q. Now, as I understand it, you had no records at all, supporting those figures?

A. No, sir.

Q. And you arrived at them merely by some process of apportionment or estimates based on subsequent years' business? A. Yes.

Mr. Jones: That is all.

(Testimony of Phillip Evans.)

Cross Examination

By Mr. Winter:

Q. Referring to what has been marked for identification, Mr. Evans, as Plaintiffs' 1, you make a statement "We further find no records available for 1932 and 1933. In order to establish the tax, the average per month was taken for the tax obtained for the years 1934 and 1935 and used that as a basis for the tax arrived at for the years 1932 and 1933", is that a fact? A. Correct.

Q. And that is what you found?

A. Correct.

Mr. Winter: That is all.

Mr. Jones: That is all, Mr. Evans.

(Witness excused) [90]

Mr. Jones: Do you want these in the record, Mr. Winter? (Indicating) I don't think I will offer this unless you want it in.

Mr. Winter: No, I don't want it in. (Referring to Plaintiffs' Exhibit No. 1, marked for identification.) You had better leave them in the file, then.

Mr. Jones, Marked for identification; that is a part of it. (Indicating) I am not going to offer them, in view of the determination arrived at.

Mr. Winter, in our complaint we set up the payments that were made and you admitted the correctness of the amounts but said that there was some difference as to the dates of payment. We have discussed the matter and I understand that it is stipu-

lated that the amounts as set up are correct and may be accepted as a basis for a judgment and that between us, we will make the proper computation—when we figure out the details and judgment, is that acceptable as a stipulation?

Mr. Winter: All except we don't want to stipulate for a judgment, but the only difference, it is understood the only difference between us, as to the dates of the payments; the amounts are correct but there are just a few little discrepancies, one or two days, and we think that will and can be adjusted, in the event of a judgment against the defendant.

Mr. Jones: On that basis, the plaintiffs rest.

Mr. Winter: We have no testimony, Your Honor.

Mr. Jones: Mr. Hooper tells me it will be desirable to introduce copies of the portion of the [91] Court records I offered as an Exhibit. May it be stipulated we may furnish copies?

Mr. Winter: Yes, no objection to furnishing copies.

The Court: I don't want Counsel on either side to feel I decided this case, rushed it through, in the matter of a decision; the fact is, I spent all day yesterday and last evening examining authorities submitted in briefs in this case and the other case set for today, but it seems to me this is a case in which the rule of res judicata is peculiarly applicable.

You have a transaction where taxes were computed over a period of a number of years, or as Mr. Jones indicated in his opening statement, the fact that the period from October 1935 until August, the

end of August 1936, was selected as a period which (to submit the matter to Judge Yankwich) isn't binding upon the Government as, apparently, no stipulation that would be binding on them as to the other years, but it is apparent to me that this particular period was selected and that it was the intention of the parties at the time that one period was submitted, that that was more or less a representative period out of the entire period, 1932 to 1938, inclusive, and Judge Yankwich decided that case——

Mr. Winter (Interrupting): Do I understand Your Honor is also ruling that decision is res judicata on the United States, with respect to the proof necessary, that they sustain the burden and didn't pass it on?

Of course, we want the Court to understand we haven't waived that contention that there is no evidence [92] here that the defendant did not pass on the tax.

The Court: Well, no, I am not ruling that decision by Judge Yankwich is res judicata as to that question, on that question, the testimony here that the plaintiffs did not pass on the tax of the corporation and there is no testimony to controvert it. I find as a matter of fact, they did not pass on any tax; that the billings were made on a basis according to the testimony of Mr. Seward of some prices, nationally advertised connecting rods, and they took the position all the way through there was no tax upon these transactions and didn't add anything to the

price on the basis of the tax—find as a matter of fact, there was no tax passed on; but, the Government had a right to appeal from Judge Yankwich's decision and didn't do so and I am convinced that under this case of 298 U. S. Tate case, or 289, Tate case, that the same theory is applicable here—the desirability of the prevention of duplication of litigation.

I will enter judgment for the plaintiffs in the amount that you will agree upon, according to your stipulation.

Mr. Winter: Your Honor, in that connection—I presume you will prepare findings, Mr. Jones?

Mr. Jones: Yes.

Mr. Winter: We will attempt to approve them and send them over to Spokane to Your Honor, or would Your Honor wish to—I don't know how long it will take.

Mr. Jones: We will do it as expeditiously as possible. [93]

The Court: There is a possibility I will be back the last of this month.

Mr. Winter: If Your Honor isn't here, we can mail them over?

The Court: Yes.

Mr. Jones: I might say, if Your Honor is interested in keeping any record of authorities in cases of this kind, that while we didn't cite this as a tax, there is an article on Res Judicata in Federal Taxation by Paul, who is a recognized authority which appears in his Selected Studies—Federal Taxation, 2d Series, I don't think we cited it as an authority,

but a great deal of the information in our brief is taken from it. I thought Your Honor might like to have that memorandum.

The Court: What is the Page?

Mr. Jones: Page 104.

The Court: All right.

(Adjournment) [94]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Judson W. Shorett, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 94, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 174, Richard S. Seward and Helen Roberts, Liquidating Trustees of Con-Rod Exchange, Inc., a corporation, Plaintiffs and Appellees vs. Thor W. Henricksen, Acting Collector of Internal Revenue, Defendant and Appellant, as required by the Designation of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, the same constituting the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original exhibits, numbered as follows, to-wit: Plaintiffs' Exhibits Nos. 1 and 2, are transmitted herewith pursuant to order of the District Court herein.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, State of Washington, this 27th day of August, 1942.

[Seal] JUDSON W. SHORETT,
Clerk.
By E. REDMAYNE,
Deputy.

[Endorsed]: Filed Aug. 26, 1942.

[Endorsed]: No. 10235. United States Circuit Court of Appeals for the Ninth Circuit. Thor W. Henricksen, Acting Collector of Internal Revenue, Appellant, vs. Richard E. Seward and Helen Roberts, Liquidating Trustees of Con-Rod Exchange, Inc., a Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed August 31, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10235

RICHARD E. SEWARD and HELEN ROBERTS, liquidating trustees of CON-ROD EXCHANGE, INC., a corporation,

Appellee,

v.

THOR W. HENRICKSEN, Acting Collector of Internal Revenue,

Appellant.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes Now Thor W. Henricksen, Acting Collector of Internal Revenue, appellant above named, and for his statement of points upon which he intends to rely on this appeal adopts the statement of points filed by him in the District Court in connection with his Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of said District Court at page 42 thereof; and appellant designates the entire transcript of record as prepared and certified by the Clerk of said Court and all of plaintiff appellee's Exhibit 2 except the Judgment, Findings of Fact and Conclusions of Law of said exhibit which are attached and made a part of plaintiff appellee's complaint which is included in the transcript of

record prepared and certified by the Clerk as necessary for the consideration of this appeal.

J. CHARLES DENNIS,
HARRY SAGER,
THOMAS R. WINTER,
Attorneys for Appellant.

[Endorsed]: Filed Aug. 31, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S AMENDED STATEMENT OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes Now Thor W. Henricksen, Acting Collector of Internal Revenue, appellant above named, and amends his Statement of Points and Designation of Record for Printing heretofore filed herein by adding the following:

IX.

The United States District Court erred in making and finding (Finding of Fact X) that the corporation upon behalf of which this action is brought did not include the excise taxes in its sales prices and did not collect said taxes or any part thereof from its vendees and that therefore the burden of said taxes was borne solely and exclusively by the corporation and the burden of none of said taxes was passed on by said corporation to its customers

or vendees and the evidence failed to support such findings.

X.

The United States District Court erred in overruling all of the Government's objections and motions appearing on pages 36, 39, 40 and 41 of the original reporter's trial transcript.

J. CHAS. DENNIS
J. Charles Dennis,
United States Attorney.
HARRY SAGER,
Ass't United States Attorney.
THOMAS R. WINTER,
Special Assistant to the Chief Counsel for the Bureau of Internal Revenue,
Attorneys for Appellant.

Copy received this 3rd day of September, 1942, and it is hereby stipulated that the appellant's Statement of Points and Designation of Record for Printing may be so amended.

JONES & BRONSON,
H. B. JONES,
Attorneys for Appellee.

[Endorsed]: Filed Sep. 4, 1942.